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Supreme Court, U.S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

PHILLIP A. BISHOP,
Petitioner

v.

O. H. DELCHAMPS, JR., ET AL.,
Respondents

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment protects the academic freedom of a professor to express controversial personal and professional opinions to students at a public university.

2. Whether, assuming a public university has authority to regulate the academic speech of its faculty, it may single out a particular viewpoint — in this case, a religious or theistic viewpoint — for discriminatory prohibition.

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, T. Michael Goodrich, Sandrall Hullett, Guy Hunt, James D. Lofton, Sr., John T. Oliver, Jr., Yetta G. Samford, Jr., Martha H. Simms, Wayne Teague, Cleophus Thomas, Jr., George S. Shirley, and Cordell Wynn, all in their official capacities as members of the Board of Trustees of the University of Alabama, are respondents. Aaron M. Aronov, Winton M. Blount, William Henry Mitchell, and Thomas E. Rast, who were Defendants-Appellants in the court below, are no longer members of the Board of Trustees, and therefore are not parties in this Court. See Sup. Ct. R. 35.3.

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 10

I. The First Amendment Protects The Right Of Professors At Public Universities To Express Controversial Opinions To Their Students 11

A. The decision below strips academic freedom of its constitutional protection 11

B. The decision below conflicts with this Court's pronouncements regarding academic freedom 14

C. The decision below conflicts with many holdings of state and lower federal courts 18

D. The reasoning of the decision is antithetical to traditional understanding of the nature and function of American universities 21

II. The First Amendment Bars Public Universities From Restricting Speech On The Basis Of Its Viewpoint Where Comparable Speech Expressing Other Viewpoints Is Permitted 24

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: *Page*

Adams v. Campbell County School District,
511 F.2d 1242 (10th Cir. 1975) 19

Bertot v. School District No. 1,
522 F.2d 1171 (10th Cir. 1975) 19

Bethel School District No. 403 v. Fraser,
478 U.S. 675 (1986) 21

Board of Education v. Mergens,
110 S.Ct. 2356 (1990) 27

Board of Education v. Pico,
457 U.S. 853 (1982) 20

Boos v. Barry,
485 U.S. 312 (1988) 26

Burns v. Rovaldi,
477 F. Supp. 270 (D. Conn. 1979) 19

Cantwell v. Connecticut,
310 U.S. 296 (1940) 27

Carley v. Arizona Board of Regents,
153 Ariz. 461, 737 P.2d 1099 (Ariz. App. 1987) 19

City Council v. Taxpayers for Vincent,
466 U.S. 789 (1984) 26

Cooper v. Ross,
472 F. Supp. 802 (E.D. Ark. 1979) 18

Dean v. Timpson Independent School District,
486 F. Supp. 302 (E.D. Tex. 1979) 19

Di Bona v. Matthews,
220 Cal. App. 3d 1329,
269 Cal. Rptr. 882 (4th Dist.),
cert. denied, 111 S.Ct. 557 (1990) 18, 19

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

Doe v. University of Michigan,
721 F. Supp. 852 (E.D. Mich. 1989) 15

Edwards v. Aguillard,
482 U.S. 578 (1987) 16, 20

Franklin v. Atkins,
409 F. Supp. 439 (D. Colo. 1976),
aff'd, 562 F.2d 1188 (10th Cir. 1977),
cert. denied, 435 U.S. 994 (1978)..... 18

Greer v. Spock,
424 U.S. 828 (1976) 21

Hazelwood School District v. Kuhlmeier,
484 U.S. 260 (1988) 8, 17, 20

James v. Board of Education,
461 F.2d 566 (2d Cir. 1972),
cert. denied, 409 U.S. 1042 (1972)..... 19

Keefe v. Geanakos,
418 F.2d 359 (1st Cir. 1969) 19

Keyishian v. Board of Regents,
385 U.S. 589 (1967)..... 10, 14, 16,
17, 18, 23, 24

Kim v. Coppin State College,
662 F.2d 1055 (4th Cir. 1981) 18

Kingsville Independent School District v. Cooper,
611 F.2d 1109 (5th Cir. 1980) 19

League of Women Voters v. FCC,
468 U.S. 364 (1984) 26

Martin v. Parrish,
805 F.2d 583 (5th Cir. 1986) 19

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

McCarthy v. Fletcher,
207 Cal. App. 3d 130,
254 Cal. Rptr. 714 (1989) 27

Memphis Community School District v. Stachura,
477 U.S. 299 (1986) 16

Moore v. Gaston County Board of Education,
357 F. Supp. 1037 (W.D.N.C. 1973) 19, 27

Papish v. Board of Curators of University of Missouri,
420 U.S. 667 (1973) 21

Parate v. Isibor,
868 F.2d 821 (6th Cir. 1989) 18

Parducci v. Rutland,
316 F. Supp. 353 (M.D. Ala. 1979) 19

Police Department of Chicago v. Mosley,
408 U.S. 92 (1972) 26

Pred v. Board of Public Instruction,
415 F.2d 851 (5th Cir. 1969),
cert. denied, 397 U.S. 1015 (1970) 19

Regents of the University of Michigan v. Ewing,
474 U.S. 214 (1985) 16, 28

River Dell Education Association v. River Dell Board of Education,
122 N.J. Super. 250, 300 A.2d 361 (1973) 19

Roberts v. Madigan,
921 F.2d 1047 (10th Cir. 1990) 20

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469 F.2d 623 (2d Cir. 1972),
cert. denied, 411 U.S. 932 (1973) 19

TABLE OF AUTHORITIES (Continued)

Cases: *Page*

Rust v. Sullivan, 111 S.Ct. 1759 (1991) 16, 22, 26

Schact v. United States,
398 U.S. 58 (1970) 26

Sterzing v. Fort Bend Independent School District,
376 F. Supp. 657 (S.D. Tex 1972),
rev'd on other grounds, 496 F.2d 92 (5th Cir. 1974) 19

Sweezy v. New Hampshire,
354 U.S. 234 (1957) 10

Texas v. Johnson,
491 U.S. 397 (1989) 21, 26

Texas Monthly, Inc. v. Bullock,
489 U.S. 1 (1989) 27

Tinker v. Des Moines Indpendent Community School District, 399 U.S. 503 (1969) 15, 16, 17, 18, 19, 26

Ward v. Rock Against Racism,
491 U.S. 781 (1989) 26

Watson v. Eagle County School District,
797 P.2d 768, 770 (Colo. App. 1990),
cert. denied, 1990 Colo. LEXIS 646
(Colo. 1990) 19

Widmar v. Vincent, 454 U.S. 263 (1981) 13, 26, 28

Wilson v. Chancellor,
418 F. Supp. 1358 (D. Ore. 1976) 19

TABLE OF AUTHORITIES (Continued)

Miscellaneous: *Page*

E. J. Ambrose, *The Nature and Origin of The Biological World* (Ellis Horwood 1982) 3

Augros & Stanciu, *The New Biology* (New Science Library 1987) 3, 4

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P. E. Johnson, *Darwin on Trial* (1991) 4

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioner Phillip A. Bishop petitions for a writ of certiorari to review the decision of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1) is reported at 926 F.2d 1066. The opinion of the district court (Pet. App. A25) is reported at 732 F. Supp. 1562.

JURISDICTION

The judgment of the court of appeals was entered on March 15, 1991. A timely petition for rehearing was denied on May

16, 1991 (Pet. App. A38). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT

This case involves the principles of academic freedom as applied to the expression of ideas from a religious perspective by a tenure track professor in a public university. The facts are undisputed.[1]

1. *Factual circumstances.* Petitioner Phillip A. Bishop is an assistant professor in the Area of Health, Physical Education, and Recreation, in the College of Education at the University of Alabama, and Director of its Human Performance Laboratory. His academic specialty is exercise physiology, the study of the effects of acute and chronic exercise on the human body. He teaches courses in exercise physiology and related fields, predominantly to graduate students pursuing doctoral degrees. See Deposition of Phillip A. Bishop (March 14, 1989) ("Bishop Dep.") at 45-47. He has published extensively in professional journals — more than any other assistant professor in his field in the University in recent years. Pet. App. A26. He is regarded as an "excellent professor" by his supervisor, Dr. Carl Westerfield, who recommended him for early tenure. *Id.*

The University of Alabama "generally endorses academic freedom for its faculty." Pet. App. A10. The University of Alabama Faculty Handbook provides that "[f]aculty members are free to present relevant material in the classroom without prior censorship, but are expected to meet the highest standards of professional integrity." Deposition of Carl Westerfield (Jan. 5, 1989) ("Westerfield Dep."), at 37, Exh. 8. The University does not prohibit faculty members from engaging in classroom speech involving their views on various subjects, whether personal or professional. Indeed, as "[n]umerous undisputed

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[1]The court of appeals expressly accepted the statement of facts by the district court. Pet. App. A2.

affidavits" in the record show, "[s]uch discussions are the norm." Pet. App. A28.[2] The district court expressly found that "[t]here is no University policy attempting to control the statements of faculty members as long as they do their job." *Id.* It also found that there is no "University policy prohibiting faculty members from organizing after-class meetings if discussions are not from a religious perspective." *Id.*

In accordance with these academic norms and understandings, petitioner "occasionally referred to his religious beliefs during instructional time." Pet. App. A26. These comments were of two sorts. First, some of the comments "concerned his understanding of the creative force behind human physiology." *Id.* Professor Bishop adheres to the view that purely random and mechanistic evolution cannot account for the complexities of modern life forms, which are more consistent with the theory of intelligent design. As he puts it, "the best scientific evaluation of complex physiological systems and the remarkably facile and efficient function of these systems, statistically, is implausibly the result of chance and hence, must be the result of a 'creative' force." Plaintiff's Answers to Defendants' First Interrogatories to Plaintiff, No. 16, at 11; see also Bishop Dep. at 21-31 (describing his position).[3] Bishop is not a Biblical literalist (*id.* at 27-28), does not teach in support of

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[2]See Affidavits of Professors Arnold E. Carden, Joseph McRae Mellichamp, Doru Stefanescu, and Dorian Yeager. Each of these professors, in different departments of the University of Alabama, testified that university administrators have "never" prohibited professors from discussing matters of "personal interest" during instructional time, that they make such personal comments during class time, and that this serves the important pedagogical goal of improving rapport with the students. See also Deposition of Carl Westerfield Dep. at 31-33 (professors are permitted to discuss a "wide range" of topics in class, including football, current movies, politics, fishing, and jogging).

[3]Although it is a minority position, opposition to a strictly materialist understanding of evolution is not uncommon among scientific researchers and teachers. See, *e.g.*, the papers collected in Ho & Saunders, eds., *Beyond Neo-Darwinism* (Academic Press 1984); E.J. Ambrose, *The Nature and Origin of the Biological World* (Ellis Horwood 1982); Augros & Stanciu, *The New Biology*

the six-day creation story of *Genesis* (*id.* at 29), and does not oppose the theory of evolution, except insofar as it presupposes that the sole mechanism of evolutionary change is chance, through random mutations (*id.* at 30-31). Some of his comments in class relate to these ideas. These comments were "spontaneous" and occurred no more than "one or two times per month." Affidavit of Phillip A. Bishop (July 11, 1989) at 4 ("Bishop Aff.").

Second, "[i]n response to students' questions concerning academic research, publishing, tenure, or promotion," petitioner "has suggested to the students that his religious beliefs are more important than academic production, and this perspective allows him to better cope with academic stresses." Pet. App. A26. Petitioner prefaced these remarks with the statement that "this is simply my personal belief. . . . You need to recognize as my students that this is my bias and it colors everything I say and do. If that is not your bias, that is fine." *Id.* at A3. These remarks occurred "on a very infrequent basis." Bishop Aff. at 2.

It is undisputed that petitioner "never engaged in prayer, read passages from the Bible, handed out religious tracts, or arranged for guest speakers to lecture on a religious topic during instructional time." Pet. App. A26. Petitioner has never been told that any of his comments disrupted instructional time or prevented him from accomplishing his teaching responsibilities. Bishop Aff. at 5. Nor has it been contended that petitioner's religious comments consumed more than the typical amount of classroom time occupied by a professor's personal remarks. Indeed, petitioner's religious references never exceeded five minutes out of 2,250 minutes of instructional time in a semester. *Id.* at 2.

(New Science Library 1987); B.C. Goodwin, "Structuralism in Biology," in 74 *Science Progress* 227 (1990). Controversy over the adequacy of orthodox evolutionary interpretations is still very much alive. See P. E. Johnson, *Darwin on Trial* (1991); Profile of "Lynn Margulis: Science's Unruly Earth Mother," in 252 *Science* 378 (April 19, 1991).

In addition to his classroom comments, petitioner conducted an optional after-class meeting for his graduate students and other interested persons in March or April, 1987, in an otherwise unoccupied classroom, on the subject "Evidences of God in Human Physiology." Pet. App. A26. During this lecture, petitioner provided a fuller statement of his professional opinion regarding intelligent design. Petitioner announced this class to his graduate students,[4] informing them that attendance was purely optional and that neither attendance nor knowledge of the material covered would affect their grade. Bishop Aff. at 5. Petitioner uses a blind grading system. Pet. App. A27. Five or six persons attended the lecture, including three of petitioner's then-current graduate students. Bishop Dep. at 39-40.

According to Dr. Carl Westerfield, petitioner's supervisor, some of petitioner's students came to him in the spring of 1987 to complain about petitioner's classroom comments and the optional lecture. Pet. App. A27; see Westerfield Dep. at 16-21. The students stated that they "did not appreciate [Professor Bishop's] interjection of Christian concepts or those type[s] of reference in class" (*id.* at 17), and that the optional lecture was "inappropriate" in that "a Christian perspective of that academic subject would be presented." *Id.* at 19.[5]

The following September, Westerfield composed and sent a memo to petitioner instructing him to refrain from "1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a

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[4]He extended the invitation only to his graduate students because the lecture covered "fairly technical material" that an uninformed audience would not be able to understand. Bishop Dep. at 39. However, the meeting was open and anyone was free to attend.

[5]The only evidence of the content of these complaints is Westerfield's recollection of them. According to his recollection, the students did not suggest that they perceived any coercion to attend the optional lecture, but only that the content was "inappropriate." Westerfield Dep. at 19. Westerfield was specifically asked whether the students had made any other complaints about the optional lecture, and answered, "No." *Id.* at 20.

'Christian Perspective' of an academic topic is delivered." Pet. App. A27; see Bishop Dep., Exh. 4. Petitioner is subject to academic discipline, ranging from a letter of reprimand to dismissal from his faculty position, if he violates the order. See Deposition of Rodney Roth (Jan. 5, 1989) ("Roth Dep.") at 44. No other professor at the University is subject to analogous restriction on either the expression of personal opinion in class or the perspective or ideological orientation from which he teaches.

Westerfield acknowledged that at the time he issued this directive to petitioner he did not know "precisely what [petitioner] said in the classroom" (Westerfield Dep. at 29), but stated that the expression of religious views on an academic topic is not "appropriate for a public institution." *Id.* at 15. He explained that petitioner's reported comments "hurt[] the reputation" of the University of Alabama because "other professional colleagues around the nation consider this the 'Bible belt' and [think] that there is a lot of this type of activity goes on in the University." *Id.* at 42-43. "I felt like we need to send a message to Dr. Bishop that these things are inappropriate." *Id.* at 43.

Petitioner protested the restriction of his academic speech to the University administration. The Dean of the School of Education, Rodney Roth, consulted the University's legal counsel, who advised that the University was under a "duty" to "control this kind of activity" to avoid violation of the Establishment Clause. Westerfield Dep., Exh. 10; see Pet. App. A27-A28. Dean Roth then reaffirmed the Westerfield memo. He stated that his objection to petitioner's academic speech was predicated solely on "legal reason[s]." Roth Dep. at 36; see also *id.* at 20 (when the matter was brought to his attention, Dean Roth treated it as a "legal issue").[6] In May of 1988,

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[6]At one point in his deposition, Dean Roth stated that "I think instructional time is important and it should be instruction based on the syllabus of the course" (Roth Dep. at 35), but on closer questioning he admitted that he "had no idea how much instructional time was being used" and that his objection was to the content of petitioner's classroom comments and not to the time they might have taken. *Id.* at 22.

Bishop petitioned the President of the University for rescission of the order, but it was reaffirmed. Pet. App. A28.

Petitioner has at all times complied with the University's order, which remains in effect. Pet. App. A27. Petitioner testified that the order has constrained his ability to speak and teach freely in the classroom. Bishop Dep. at 42-43.

2. *Procedural history.* Petitioner brought suit in the United States District Court for the Northern District of Alabama against respondents, the Trustees of the University of Alabama, contending, among other things, that the limitation on his classroom and extracurricular speech violated the Free Speech Clause of the First Amendment, as applied to the states through the Fourteenth Amendment. In answer, respondents contended that the University had a duty to impose this limitation under the Establishment Clause of the First Amendment. Pet. App. A28-A29.

On cross motions for summary judgment, the district court entered an order enjoining respondents from restricting petitioner's classroom speech or prohibiting petitioner from conducting optional after-class lectures, provided he assures his class that he will use a blind grading system. Pet. App. A36-A37. The district court held that "[f]aculty members are at liberty to divulge personal views in the classroom as long as they are not disruptive of classroom activities." *Id.* at A31. It found, as a factual matter, that petitioner's "expression of his personal views has not been disruptive and has not interfered with his teaching which is viewed as commendable." *Id.* at A32.

Noting that "[t]he University's only justification" for exclusion of petitioner's religious views from the classroom "is an effort to avoid an establishment of religion," the court held that "[t]his is not sufficiently compelling to support a content-based discrimination against plaintiff's extracurricular on-campus discussions with students or his in-class statements." Pet. App. A32. It held that petitioner's comments "constitute a discussion of means and origins, a legitimate educational topic," and thus had a secular purpose (*id.* at A33), and that the after-

class meeting was "part of an open exchange of ideas between students and faculty," which is "consistent with the University's educational purpose and consistent with the practices of other professors who participate in such meetings" (*id.* at A32). The court held that petitioner's comments "do not primarily advance religion" because "[t]here is no evidence that anyone believes his comments are anything other than his personal 'bias' or that his religious views are in the least way sponsored by the state." *Id.* at A34. It observed that "[t]he court doubts that the plaintiff's minimal comments exert influence on the religious beliefs of college or graduate students." *Id.* at A35. The court also rejected respondents' argument that petitioner's activities would lead to excessive government entanglement with religion, noting, to the contrary, that to monitor petitioner's speech for religious references would "be an especially offensive violation" of the First Amendment. *Id.* at A36.[7]

The Court of Appeals for the Eleventh Circuit reversed. While adopting the district court's statement of facts (Pet. App. A2), the court held that the order restricting petitioner's speech was within the "University's authority to reasonably control the content of its curriculum, particularly that content imparted during class time." *Id.* at A16; see also *id.* at A24. The court held that academic freedom is not "an independent First Amendment right" (*id.* at A18). In so holding, the court relied on this Court's cases involving the speech of high school students participating in school-sponsored activities. *Id.* at A15-A16, citing *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260 (1988). The court argued that "a teacher's speech can be taken as directly and deliberately representative of the school" (Pet. App. A13). Under this reasoning, "[t]he University necessarily has dominion over what is taught by its professors." *Id.* at A24. The University may prohibit a professor from teaching

[7]The district court also held that the restriction on petitioner's speech was vague, in that it "fails to provide adequate notice of the proscribed speech," and overbroad, in that it "reaches statements not violative of the Establishment Clause." Pet. App. A32.

from a particular "viewpoint" during instructional time, "even to the extent that it represents his professional opinion about his subject matter." *Id.* at A20.

Based on the same reasoning, the court of appeals also held that "the University may restrict a professor from conducting an 'extra' or 'optional' class or meeting under the patronage of a university course." Pet. App. A23. "In particular," the court stated, "scheduling the class directly before finals and describing it as an 'optional class' can be prohibited to avoid the apparent sponsorship of the University." *Id.* The court noted, however, that "the University cannot prevent Dr. Bishop from organizing such a meeting for interested persons, either on or off University grounds." *Id.*

In response to petitioner's argument that his religious viewpoint was singled out by the University, the court of appeals acknowledged that "the University has no policy for limiting the speech of its professors only to their subject areas" and that the record contains "numerous affidavits by other instructors at the University" regarding their "extracurricular speech in the classroom." Pet. App. A10. But the court distinguished petitioner's speech on the ground that "some topics understandably produce more apprehension than comfort in students" and that no other speech by an instructor "has produced student complaints or struck constitutional chords." *Id.* The court observed that "[j]ust as women students would find no comfort in an openly sexist instructor, an Islamic or Jewish student will not likely savor the Christian bias that Dr. Bishop professes." *Id.*

Having held that the University has broad authority to regulate the academic speech of its professors, the court did not reach respondents' contention that the restriction was required by the Establishment Clause. Pet. App. A22.[8]

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[8]The court of appeals rejected the district court's conclusion that the memo to petitioner was unconstitutionally vague, stating that "as a professional, Dr. Bishop know[s] that the University asks only that he separate his personal and professional beliefs and that he not impart the former to his

REASONS FOR GRANTING THE PETITION

One can imagine a professor of exercise physiology at the University of Alabama 30 years ago making "occasional comments" to his class that his studies of the human body confirmed the equality of black and white, and one can imagine the administrators of the University of Alabama, 30 years ago, issuing a directive ordering him to cease from interjecting his personal political opinions into his classroom teaching. One cannot imagine, however, that a federal court of appeals would uphold such a directive, stripping the academic freedom of public university professors of any significant First Amendment protection and condoning express viewpoint-based restrictions on speech on the ground that some students had complained. Yet that is precisely what the court below has done — the sole differences being that the date is 1991 and the professor's comments were about the intelligent design of the body rather than about racial equality.

Academic freedom today is under threat from a different source than it was 30 years ago, but the legal principles have not changed. Contrary to the court below, academic freedom remains "a special concern of the First Amendment." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). "The essentiality of freedom in the community of American universities is almost self-evident." *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957). In this case, the threat to academic freedom arises from the embarrassment of administrators who fear that academics at other institutions might come to regard the University of Alabama as a "Bible Belt" university. Elsewhere, it comes from the impulse to impose a regime of "political correctness" on the academy. The speech so suppressed in academia may seem to some of us misguided, unscientific, parochial, or immoral. Some may think that of Professor Bishop's opinions. But whatever the ideological impetus to censor academic speech, and whatever the ideological target, the First Amend-

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students during 'instructional time' or under the guise of the courses he teaches in so-called optional classes." Pet. App. A10.

ment stands as a barrier to the imposition of academic orthodoxy and a shield for the free expression of controversial, even embarrassing, ideas.

The decision of the court of appeals is an unequivocal rejection of the proposition that the First Amendment protects academic freedom. It expressly reduces the constitutional protection for the academic speech of university professors to the level of high school students writing for a school newspaper as part of a journalism class. Pet. App. A15-A16. It subjects the University's directive regarding the professor's speech in the classroom to mere "reasonableness" review (Pet. App. A15, A16, A19, A20, A24) — "even to the extent that it represents his professional opinion about his subject matter" (*id.* at A20). It tolerates even expressly viewpoint-discriminatory regulation. *Id.* at A10, A20. It thus stands in conflict with this Court's academic freedom decisions, and with numerous cases in the lower courts. Review of this decision is needed to reaffirm the constitutional principles that protect academic freedom and to provide clear guidance to the lower courts about how to adjudicate claims of interference with academic freedom by administrators of public universities.[9]

I. The First Amendment Protects The Right Of Professors At Public Universities To Express Controversial Opinions To Their Students

A. The decision below strips academic freedom of its constitutional protection

The first question raised by this case is whether academic freedom in the university classroom is entitled to constitutional protection under the First Amendment. While profess-

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[9]The First Amendment principles invoked in this petition apply only to public institutions. Virtually all private, nonsectarian colleges and universities embrace the same principles of academic freedom, but in most cases these are legally enforceable as a matter of contract, if at all. Religious colleges and universities sometimes modify academic freedom principles in

ing itself "mindful of the invaluable role academic freedom plays in our public schools," Pet. App. A17-A18, the court of appeals observed that "we do not find support to conclude that academic freedom is an independent First Amendment right." Pet. App. A18. The court drew a distinction between the academic freedoms of publication and extramural speech, which it recognized as legally protected, and the academic freedom of the classroom, which it did not. See Pet. App. A20 (a professor's "educational judgment can be questioned and redirected by the University when he is acting under its auspices as a course instructor, but not when he acts an an independent educator or researcher"). With regard to teaching, "[t]he University's conclusions about course content must be allowed to hold sway over an individual professor's judgments . . . even to the extent that it represents his professional opinion about his subject matter." *Id.*

Accordingly, the court held that restrictions imposed by a public university on the academic speech of its professors need only satisfy "reasonableness" review — the lowest level of judicial scrutiny. The court treated the University as "a public employer which may reasonably restrict the speech rights of employees more readily than those of other persons." Pet. App. A16. The court stated that university administrators have the authority to impose "'reasonable restrictions' over in-class speech that it could not censor outside the classroom." *Id.* at A15. Most importantly, the court held that the University "has an interest . . . in scrutinizing expressions that 'the public might reasonably perceive to bear [its] imprimatur.'" *Id.* at A13 (citation omitted; brackets in original). This is the right of academic censorship, plain and simple. If the classroom speech of all of its instructors can reasonably be "taken as directly and deliberately representative of the school," as the court of appeals averred (*id.*), it must follow that every instruc-

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order to maintain their creedal commitments. References in this petition to "universities" should be understood as limited by this context.

tor can be required to confine himself to ideas that the University is willing to approve.[10]

The outcome of this case depends squarely on the choice of legal standard. The district court had held, as a matter of law, that "[f]aculty members are at liberty to divulge personal views in the classroom as long as they are not disruptive of classroom activities" and have a "constitutionally protected right" to inform their students of their "personal political and philosophical views" so long as they do not "proselytize students or . . . devote so much of class time to such matters that instruction of the subject matter is impaired." Pet. App. A31-A32 (citation omitted). It found, on the question of fact, that "Bishop's actions do not rise to that level. Expression of his personal views has not been disruptive and has not interfered with his teaching which is viewed as commendable." *Id.* at A32. The court of appeals expressly adopted the district court's factual findings, but disagreed with the district court's statement of "the controlling legal principles and the conclusions to be drawn from them" (Pet. App. A2), and on this basis reversed the decision.

It must be emphasized that the court of appeals' rejection of First Amendment protection for academic freedom in the classroom is not limited to religious speech. Indeed, the court analogized Bishop's comments to those of a "sexist instructor" and suggested that speech that produces "more apprehension than comfort in students" is subject to university regulation. Pet. App. A10. This underscores the breadth and danger of the court's position. This sweeping decision would allow a public university to bar a professor from expressing opposition to affirmative action on the ground that such teaching causes

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[10]Thus, even if respondents' actions were evaluated under a "reasonableness" standard, they should be held to violate the First Amendment, because the only pedagogical concern identified by the University or mentioned by the court of appeals was the desire to avoid placing the University's "imprimatur" on petitioner's views, which is an illegitimate concern. See *Widmar v. Vincent*, 454 U.S. 263, 280-81 (1981) (Stevens, J., concurring).

"anxiety in students" (*id.* at A22), or to forbid an economist from teaching economics from a Marxist perspective on the ground that this places the university's "imprimatur" (*id.* at A13) on Marxist ideology. This puts an end to academic freedom as a legal proposition.

B. The decision below conflicts with this Court's pronouncements regarding academic freedom

The decision below conflicts with principles of academic freedom long enunciated by this Court. The leading case is *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). The Court held that

> academic freedom . . . is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.

Id. at 603 (citations and internal quotations omitted). By this the Court did not mean that only those academic perspectives approved by university administrators were protected. It did not suggest that the judgments of university administrators — or anyone else — "must be allowed to hold sway over an individual professor's judgments" (Pet. App. A20). Rather, *Keyishian* embraced the tradition of academic freedom that has governed modern American research universities since their beginnings in the late 19th Century — the tradition that individual scholars must have independence to teach in the classroom without interference from the outside, except on carefully limited grounds closely related to instructional performance.

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court addressed the legality of restrictions on the expression of controversial political opinions in the educational context (in that case, the wearing of black arm bands to protest the war in Vietnam). The Court held that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Id.* at 511. This meant that administrators could not suppress the expression of opinions "even on controversial subjects," unless the speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" or "collide[] with the rights of others." *Id.* at 512-13. This did not include the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. The Court made clear that this right of expression extends to both "teachers and students." *Id.* at 506.

These general principles of academic freedom are reinforced by the doctrines of vagueness and overbreadth. *Keyishian*, 385 U.S. at 603-04. As a practical matter, it is difficult for university authorities to interfere in academic speech in ways that are sufficiently precise and narrowly tailored to pass constitutional muster. See *Doe v. University of Michigan*, 721 F. Supp. 852, 866-67 (E.D. Mich. 1989). In this case, the district court found that the order restricting petitioner's speech was both vague and overbroad (Pet. App. A32) — a conclusion the court of appeals was able to overcome only by interposing a "narrowing construction" (Pet. App. A9) that both conflicts with the plain language of the order and is internally inconsistent. See *id.* at A20 (interpreting the ban on "optional classes" as permitting optional classes); and compare *id.* at A10 (the "University asks only that [petitioner] separate his personal and professional beliefs") with *id.* at A20 (University may censor his classroom speech "even to the extent that it represents his professional opinion about his subject matter"). Moreover, given the lack of general standards, no faculty member at the

University of Alabama can predict when his expression of personal or professional opinion may lead to similar rebuke.

Since *Keyishian* and *Tinker*, these principles have been reiterated in numerous opinions of the Court — though no case has presented so direct an infringement on academic freedom in the university classroom as this one. *E.g., Rust v. Sullivan*, 111 S. Ct. 1759, 1776 (1991) (the Court has "recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere . . . is restricted by the vagueness and overbreadth doctrines of the First Amendment"); *Edwards v. Aguillard*, 482 U.S. 578, 586 n.6 (1987) (citation omitted) (academic freedom is "the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment"); *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 309 (1986) (calling the dismissal of a teacher for allegedly inappropriate classroom presentation a violation of "academic freedom"); *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 n.12 ("Academic freedom thrives . . . on the independent and uninhibited exchange of ideas among teachers and students"). See Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 Law & Contemp. Prob. 79 (1990).

The decision below conflicts with this established line of Supreme Court decisions. It holds, in conflict with *Keyishian*, that the classroom teaching of a university professor is not constitutionally protected (beyond "reasonableness" review). And it holds, in conflict with *Tinker*, that the expression of controversial opinions can be prohibited even if there is no evidence of classroom disruption or other interference with instructional effectiveness. The court sought to distinguish *Keyishian* on the ground that "*Keyishian* dealt with that brand of regulation most offensive to a free society: loyalty oaths" and "cannot be extrapolated to deny schools command of their own courses." Pet. App. A17. It distinguished *Tinker* on

the ground that "the case involves students, not teachers" (*id.* at A12), disregarding the language of the *Tinker* opinion, which included both "teachers and students" (393 U.S. at 506) within its ambit.

Having brushed aside *Keyishian* and *Tinker*, the court of appeals "adopt[ed] . . . as suitable to our ends" the constitutional standard applied in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Pet. App. A15-A16. In *Kuhlmeier*, the Court held that high school officials could exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. Without explanation, the court of appeals extended this principle from high schools to universities, and from students to professors. Under the court's holding, the academic freedom of university professors in the classroom is reduced to the level of high school journalism students writing for the school's newspaper. That is a shocking proposition, which calls out for this Court's review.[11]

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[11] In *Kuhlmeier*, the Court expressly noted that its holding would not necessarily apply to the university level. 484 U.S. at 273-74 n.7. Among the many differences between *Kuhlmeier* and this case are: (1) in *Kuhlmeier*, the Court relied on express school policies and practices placing the content of the newspaper under the authority of the journalism teacher, subject to review by the principal (*id.* at 268-69), whereas in this case the University of Alabama Faculty Handbook and the consistent practices of the University (other than in this instance) accorded broad academic freedom to professors and protected their right to make controversial comments in class and to conduct after-class meetings; (2) the constitutional standard in *Kuhlmeier* is based on the principle that "the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials" (*id.* at 273), whereas higher education is based on the principle that the classroom is an extension of independent scholarly inquiry; and (3) editorial control over a student journalist's writing is an inevitable part of journalistic education (as it is of professional journalism), whereas administration control over the viewpoints expressed by a professor is antithetical to the educational process and contrary to the tradition of academic freedom in higher education.

C. The decision below conflicts with many holdings of state and lower federal courts

In addition to conflicting with *Keyishian* and *Tinker*, the decision below is inconsistent with a number of lower-court decisions that have applied the *Tinker* standard to the classroom speech of professors at the university level. On its facts, this case is remarkably similar to *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979), in which an untenured history professor was denied reappointment after he informed his class that he was a communist and that he taught his courses from a Marxist point of view. The court held the University's action unconstitutional, applying the "material and substantial interference" standard of *Tinker*. *Id.* at 810. The court concluded that the professor's "announcement of his personal, political and philosophical beliefs in his classes was constitutionally protected." *Id.*[12] The decision below also conflicts with the Fourth Cir-cuit's decision in *Kim v. Coppin State College*, 662 F.2d 1055, 1063-65 (4th Cir. 1981), which held that the First Amendment protects the academic freedom of professors to express controversial opinions to students in the absence of an "objective evaluation of the actual harm caused, not perceived or potential harms." See also *Parate v. Isibor*, 868 F.2d 821 (6th Cir. 1989); *Franklin v. Atkins*, 409 F. Supp. 439, 445-46 (D. Colo. 1976), aff'd, 562 F.2d 1188 (10th Cir. 1977), cert. denied, 435 U.S. 994 (1978); *DiBona v. Matthews*, 220 Cal. App. 3d 1329, 1344, 269 Cal. Rptr. 882, 891 (4th Dist.), cert. denied, 111 S.

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[12]In *Cooper*, the University attempted to "prove that because Cooper taught from the Marxist point of view, he deviated from the prescribed subject matter." The court found, however, that "there was little or no evidence that Cooper did not substantially cover the material." 472 F. Supp. at 813. Similarly, in this case, University administrators sought to justify their action on the basis that Professor Bishop's comments were not part of his subject (Roth Dep. at 49), but acknowledged that the comments had not affected Professor Bishop's "ability to cover the course material that he has been assigned to cover" (Westerfield Dep. at 44).

Ct. 557 (1990); *Carley v. Arizona Bd. of Regents*, 153 Ariz. 461, 737 P.2d 1099 (Ariz. App. 1987).

Even at the high school level, many courts have held that the teacher's expression of ideas to students is constitutionally protected, applying the *Tinker* standard or higher. *E.g., Kingsville Independent School Dist. v. Cooper*, 611 F.2d 1109, 1113 (5th Cir. 1980); *Bertot v. School District No. 1*, 522 F.2d 1171, 1183 (10th Cir. 1975); *Russo v. Central School Dist. No. 1*, 469 F.2d 623, 631-33 (2d Cir. 1972) cert. denied, 411 U.S. 932 (1973); *James v. Bd. of Education*, 461 F.2d 566 (2d Cir. 1972), cert. denied, 409 U.S. 1042 (1972); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Pred v. Bd. of Public Instruction*, 415 F.2d 851 (5th Cir. 1969), cert. denied, 397 U.S. 1015 (1970); *Dean v. Timpson Independent School Dist.*, 486 F. Supp. 302, 307-08 (E.D. Tex. 1979); *Wilson v. Chancellor*, 418 F. Supp. 1358, 1364 (D. Ore. 1976); *Sterzing v. Fort Bend Independent School Dist.*, 376 F. Supp. 657, 661-62 (S.D. Tex. 1972), rev'd on other grounds, 496 F.2d 92 (5th Cir. 1974); *Moore v. Gaston County Bd. of Ed.*, 357 F. Supp. 1037, 1040 (W.D. N.C. 1973); *Parducci v. Rutland*, 316 F. Supp. 353 (M.D. Ala. 1979); *Watson v. Eagle County School Dist.*, 797 P.2d 768, 770 (Colo. App. 1990), cert. denied, *Eagle County School District RE-50 v. Watson*, 1990 Colo. LEXIS 646 (Colo. 1990); *River Dell Education Ass'n v. River Dell Bd. of Ed.*, 122 N.J. Super. 350, 300 A.2d 361, 365 (1973).

These decisions are in conflict with the decision below. Any degree of academic freedom recognized at the high school level applies, *a fortiori*, to university professors (though the converse is not necessarily true). The position of the court below, that university professors have no greater academic freedom than teachers at the secondary level (Pet. App. A15-A16), has been emphatically rejected by most other lower courts. *E.g., Martin v. Parrish*, 805 F.2d 583, 588 (5th Cir. 1986) (Hill, J., concurring); *Adams v. Campbell County School Dist.*, 511 F.2d 1242, 1247 (10th Cir. 1975); *Burns v. Rovaldi*, 477 F. Supp. 270, 275-76 (D. Conn. 1979); *DiBona*, 269 Cal. Rptr. at 892-93, 220 Cal. App. 3d at 1345-1347. This Court has noted

that the mandatory attendance and greater impressionability of students makes it more necessary and appropriate for school officials to control the content of the speech in the high school classroom. *Edwards v. Aguillard*, 482 U.S. 578, 584 & n.5 (1987); *Kuhlmeier*, 484 U.S. at 272. See also *Board of Education v. Pico*, 457 U.S. 853, 914 (1982) (Rehnquist, J., dissenting). These conditions do not exist in the university.[13]

The importance of resolving this conflict is underscored by recent analyses in the academic literature. Compare Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 Law & Contemp. Prob. 227 (1990) (arguing that the academic freedom of individual professors at public universities is constitutionally protected), with Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 Yale L.J. 251 (1989) (arguing that, for the most part, constitutional protections for academic freedom have been and should be confined to protections for the institutional autonomy of the university rather than the autonomy of the professor *vis-a-vis* the university). The decision below exacerbates this uncertainty about constitutional protection, and thus contributes to the atmosphere of vulnerability of unpopular viewpoints in the academy. This Court's guidance is urgently needed so that professors, administrators, and lower courts will know what legal protections exist for academic speech in the nation's universities.

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[13]The court of appeals stated that *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990), petition for cert. pending, No. 90-1448, is "factually similar" to this case. Pet. App. A13. But *Roberts* involves a fifth grade teacher — a context that is neither factually nor legally comparable to that of a university professor. Accordingly, the legal issues in the two cases are entirely different: *Roberts* centers on the application of the Establishment Clause to a fifth grade classroom, while this case centers on the academic freedom of university faculty under the Free Speech Clause.

D. The reasoning of the decision below is antithetical to traditional understandings of the nature and function of American universities

Application of the Free Speech Clause to particular circumstances is heavily dependent on the institutional setting. Compare, *e.g.*, *Greer v. Spock*, 424 U.S. 828 (1976) (antiwar leafletting on military base held unprotected), with *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning in public demonstration held protected), or *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) (sexually suggestive speech by student orator at high school assembly held unprotected), with *Papish v. Bd. of Curators of University of Missouri*, 410 U.S. 667 (1973) (sexually explicit language in underground college newspaper held protected). In each instance, the purpose is to apply the free speech principles of the First Amendment in light of the traditional expectations and competing purposes of the forum in which the speech takes place. Academic freedom is simply the application of freedom of speech in the particular context of the university classroom. See Rabban, *supra*, 53 Law & Contemp. Prob. at 246-47 (academic freedom should be viewed "not primarily as a special right unique to professors, but as a specific application of the broader principle that the institutional context of speech often has first amendment significance"). Unfortunately, the decision below rests on several fundamental misconceptions regarding the nature of American higher education, and thus misperceives the degree to which university authorities can control a professor's expression of personal or professional opinion in the classroom.

First, under American traditions of academic freedom it is not true, as the court of appeals repeatedly stated in various words, that University administrators exercise "dominion over what is taught by its professors" (Pet. App. A24). The University must establish the contours of the curriculum, and may dictate issues of curricular coverage, but it may not determine the professor's viewpoint or scholarly approach. It is essential to classroom teaching that the professor be independent — and that means he must have latitude to say things the admin-

istrators deem "inappropriate," as well as things they support. The 1915 *Declaration of Principles* of the Association of American University Professors, the foundational document upon which modern understandings of academic freedom are based, explains the principle this way:

> It is scarcely open to question that freedom of utterance is as important to the teacher as it is to the investigator. No man can be a successful teacher unless he enjoys the respect of his students, and their confidence in his intellectual integrity. It is clear, however, that this confidence will be impaired if there is suspicion on the part of the student that the teacher is not expressing himself fully or frankly, or that college and university teachers in general are a repressed and intimidated class who dare not speak with that candor and courage which youth always demands in those whom it is to esteem.

General Report of the Committee on Academic Freedom and Tenure, 1 AAUP Bulletin 17 (1915), reprinted at 53 Law & Contemp. Prob. 393, 398 (1990). The court of appeals' assumption that academic freedom pertains only to publications and extramural speech (Pet. App. A19, A20) is contrary to the fundamental theory of academic freedom upon which all modern American academic life depends.

Second, the authority of university administrators over professors may not be equated to that of "a public employer which may reasonably restrict the speech rights of employees." Pet. App. A16. The 1915 *Declaration of Principles* observes that university professors are "appointees, but not in any proper sense the employees" of the University authorities. This is because, "once appointed, the scholar has professional functions to perform in which the appointing authorities have neither competency nor moral right to intervene." 53 Law & Contemp. Prob. at 397. See *Rust v. Sullivan*, 111 S. Ct. at 1776. University professors have not just the right, but the responsibility, to follow their own scholarly judgment in their utterances to their students. This means that some professors will

express views that seem benighted to the administration. That is the price we pay for academic freedom. Sometimes it is not a price but an inestimable benefit.

Third, the court of appeals wrongly assumed that "a teacher's speech can be taken as directly and deliberately representative of the school." Pet. App. A13. This, according to the court, gives the University an "interest . . . in scrutinizing expressions that the public might reasonably perceive to bear [its] imprimatur." *Id.* (internal quotation omitted; bracket in original). No proposition could be more dangerous to the freedom of scholarly inquiry than the proposition that the university may censor its professors' classes in order to dissociate itself from ideas that might generate public disapproval. A professor has and must have scholarly independence. If the public misunderstands this — as has happened all too often in our history — this is properly an occasion for public education about the nature of scholarly inquiry, not a justification for censorship.

Finally, the court of appeals assumed that "a professor's speech inherently possesses" a "coercive effect upon students," which the university has a legitimate interest in regulating. Pet. App. A16. To the contrary, the premise of higher education is that exposure to ideas is liberating, not coercive. The student may be exposed to the opinions of a socialist in the morning and a supply-sider in the afternoon, to a theist on Mondays and an atheist on Tuesdays. To preclude a student from hearing the professor's opinions, in the guise of "protecting" him from "coercion," is antithetical to the philosophy of higher education. "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian*, 385 U.S. at 603 (citation omitted; brackets in original).[14]

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[14]The court of appeals noted that "[t]he University's interest is most obvious when student complaints suggest apparent coercion— even when not intended by the professor." Pet. App. A16. Petitioner wholeheartedly agrees

The decision below thus relies on an understanding of the university wholly at odds with this Nation's long-standing traditions of scholarly inquiry and academic freedom. As powerful voices are raised in academia for increased regulation of the political correctness of university instruction (see generally D. DeSouza, *Illiberal Education* (1991)), the protections of the First Amendment are urgently needed to forestall even well-meaning university regulations that would "cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603.

II. The First Amendment Bars Public Universities From Restricting Speech On The Basis Of Its Viewpoint, Where Comparable Speech Expressing Other Viewpoints Is Permitted

Even apart from the First Amendment's "special concern" for academic freedom, the decision of the court below is inconsistent with the most fundamental principle of freedom of speech: that government officials may not discriminate among speakers on the basis of their viewpoint. See Stone, *Content Regulation and the First Amendment*, 25 Will. & M. L. Rev. 189 (1983).

Except for the viewpoint, petitioner's classroom statements of his religious opinions do not differ from the statements of a feminist professor of literature who might make comments about the subordination of women as seen in the works under review, of an economically-oriented law professor about the efficiency of the common law, or of an atheistic professor of

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that the University has the right and the responsibility to protect students from academic coercion. See pages 28-29, *infra*. But the existence of complaints does *not* necessarily suggest coercion; it may merely suggest student disagreement or ideological disapproval. In this case, the students who complained did not allude to any pressure or coercion (see note 5, *supra*), and the district court expressly rejected respondents' claim that petitioner's actions were coercive. Pet. App. A27, A34. If Professor Bishop's mild statements in class were deemed "coercive," there could be no such thing as "noncoercive" speech in a university setting.

zoology about the inconsistency between the idea of divine creation and the facts of biology. Each of these comments reflects a certain ideological orientation, each is related, at least indirectly, to the subject matter, and each is within the normal range of expected behavior in a university classroom. Even if Professor Bishop's comments were wholly irrelevant to the subject matter, this would not be different — except as to viewpoint— from the professor who devotes a few minutes of class to denouncing the War in Vietnam, the President's choice of a Supreme Court nominee, or the dismal performance of the Chicago Cubs. Similarly, petitioner's comments to his graduate students that his priorities in life, derived from his Christian faith, help him to deal with academic stress, are not different — apart from the viewpoint expressed — from the advice any other professors might give students about academic life, based on their personal experiences, priorities, or values. In the university, no one philosophy or viewpoint is privileged, and none is categorically excluded.

The record in this case shows that the University of Alabama does not forbid its professors to make personal comments in class; indeed, this is the "norm." Pet. App. A6, quoting Pet. App. A28. The district court found that "[t]here is no University policy attempting to control the statements of faculty members as long as they do their job." *Id.* at A28. Petitioner is the only University of Alabama professor to be censored; and his theistic point of view is the only ideological perspective to be banned. On the face of the memo sent to petitioner, the viewpoint-based discrimination is apparent: only "religious beliefs" are covered — not anti-religious beliefs, not political beliefs, not social beliefs — and only optional lectures "where a 'Christian Perspective' of an academic topic is delivered" are subject to special rules.[15] The University has never stated any

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[15]The district court observed:

> It would be clearly violative of the first amendment to allow presentation of one side of a debatable public question an advantage while suppressing the other. The University's directive is inconsistent. While it precludes discussion of academic subjects from a

reason — other than his religious viewpoint — why petitioner has been denied rights extended to every other member of the University of Alabama faculty.

There is no more deeply-ingrained principle of free speech than that "the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *City Council v. Taxpayers For Vincent*, 466 U.S. 789, 804 (1984); see *Rust v. Sullivan*, 111 S. Ct. at 1772; *Texas v. Johnson*, 491 U.S. 397, 413 n.9 (1989); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Boos v. Barry*, 485 U.S. 312, 318-19 (1988); *Schacht v. United States*, 398 U.S. 58 (1970). "A regulation of speech that is motivated by nothing more than a desire to curtail expression of a particular point of view on controversial issues of general interest is the purest example of a 'law . . . abridging the freedom of speech, or of the press.'" *League of Women Voters v. FCC*, 468 U.S. 364, 383-84 (1984). "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). "Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Tinker*, 393 U.S. at 511. To single out petitioner's opinions — when professors holding other, equally controversial, opinions are free to comment about them in class or to lecture about them to willing audiences — is an unmistakable violation of this principle.

That petitioner's intellectual perspective happens to be religious does not remove his speech from the protections of the First Amendment. Content-based regulation of speech is no more legitimate when the speech is religious than when the speech is secular. See *Widmar v. Vincent*, 454 U.S. 263 (1981);

"Christian Perspective," it does not ban Jewish, Moslem, Hindu, Taoist, or other religious perspectives of course work.
Pet. App. A35.

Board of Education v. Mergens, 110 S. Ct. 2356, 2370-71 (1990); *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940). Cf. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (prohibiting discrimination in favor of religious periodicals).[16] We recognize that religious opinions are frequently controversial and that some listeners may be offended by them. But the same can be said of Afrocentric perspectives, Freudian perspectives, or the doctrine of original intent in constitutional law, all of which are protected under the First Amendment. Unless the circumstances of the speech are such that it might violate the Establishment Clause — and the district court held that petitioner's speech did not, a conclusion the court of appeals did not overturn[17] — there is no basis for treating petitioner's religious perspective as uniquely dangerous or intellectually inferior.

Petitioner agrees that the judiciary should not intervene in or second guess the "genuinely academic decision[s]," of uni-

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[16]Courts have frequently protected the academic freedom rights of instructors to present *anti-religious* materials or opinions to their students. *E.g.*, *Moore v. Gaston County Bd. of Education*, 357 F. Supp. 1037 (W.D. N.C. 1973); *McCarthy v. Fletcher*, 207 Cal. App. 3d 130, 254 Cal. Rptr. 714 (1989). It would be anomalous to protect academic discourse that attacks or degrades religion, but not academic discourse that supports it.

[17]The district court's conclusion regarding the Establishment Clause (Pet. App. A32-A36) is obviously correct. Just as university (and even high school) students understand "that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis" (*Mergens*, 110 S. Ct. at 2372), they understand that professors' personal opinions are their own. It would be difficult to say whether this is the result of academic freedom or a prerequisite for it; but in an institution that publicly announces a policy of academic freedom it is manifest to all that the views of the faculty cannot be attributed to the university and that the students are free to make up their own minds as part of the freedom of intellectual inquiry. Of course, the institution has a special responsibility in the context of religion to ensure that the faculty member conducts himself in such a way that the students are not coerced into professing his religious beliefs, but as discussed below, the problem of potential coercion is not unique to religious perspectives and must be resolved without discrimination on the basis of viewpoint.

versity authorities, made in "good faith" and not on the the basis of "nonacademic or constitutionally impermissible reasons." *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985). In this case, however, the final decision-makers viewed the dispute as a "legal issue" (Roth Dep. at 20, 36) rather than a pedagogical one. University lawyers opined that the University had a legal "duty" to suppress petitioner's speech (Westerfield Dep., Exh. 10, at 3), and the administrators followed that advice. In district court, the "only justification" respondents asserted for their limitation on petitioner's classroom speech was it was required by the Establishment Clause. Pet. App. A32. There is no reason the courts should defer to the hypertrophic interpretations of the Establishment Clause held by university administrators and attorneys. *Widmar v. Vincent*, 454 U.S. at 280-81 (Stevens, J., concurring).

The University's misplaced reliance on the Establishment Clause is an admission that its treatment of petitioner was based on the religious content of his speech rather than any neutral pedagogical justification. Beyond supposed constitutional problems, petitioner's supervisors never identified any issue of "academic" concern about his teaching — unless this would include Dr. Westerfield's notions that religious opinions are "inappropriate" and might cause "other professional colleagues around the nation" to think of the University of Alabama as a "Bible Belt" institution (Westerfield Dep. at 42-43). Needless to say, to discriminate against religious opinions on this basis is no more legitimate than to censor the teaching of a Critical Legal Studies adherent out of fear that alumni may view the school as "left-wing," or of a Zionist for fear of offending Third World sensibilities.

Petitioner freely concedes the rightful authority of University administrators, through proper academic procedures, to set the curriculum for his classes and to evaluate his professional competency. This case presents no challenge to those powers. Professor Bishop's supervisors have stated that his comments have not interfered with his coverage of the assigned material (Westerfield Dep. at 45) and that he is a excel-

lent teacher and scholar (*id.* at 51). Petitioner also agrees that the University has the rightful authority to make and enforce certain rules regarding faculty performance in the classroom. Specifically, the University has the right to demand that any personal comments made in class do not consume so much time that the coverage of the material suffers; that any comments not disrupt the class or interfere with the teaching mission; and that any expression of ideological opinion be done in a noncoercive manner. Academic freedom does not include the right to abuse the classroom for propaganda purposes.[18] But petitioner insists that such regulation be neutral toward competing intellectual perspectives, philosophies, and ideologies. It is not permissible for the University to apply one standard to professors who are feminists or post-structuralists, for example, and another to those who are positivists or libertarians — or Christians or Buddhists. The University's action, which openly discriminates against petitioner's religious viewpoint, contravenes the First Amendment.

From one generation to the next, the targets of academic intolerance shift. Where once persons of a vaguely left-wing ideology were drummed out of the academy on suspicion of being subversive, the right to teach from a Marxist point of view is now a commonplace. Today, the University of Alabama would never order a Marxist professor to stop interjecting his opinions in class or to cease from offering a "Marxist Perspective" to those who wished to attend an optional lecture. Such an action would be instantly, and properly, condemned by the University community. Professor Bishop is not so fortunate. His intellectual viewpoint commands little support in academia and is considered a source of embarrassment by his superiors. The ordinary processes of internal academic gover-

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[18]Petitioner testified that he does not consider it "ethical to intimidate or coerce" students to adopt the instructor's philosophy (Bishop Dep. at 77). It is undisputed that he was careful to identify his own classroom remarks as his personal belief or "bias," which the students were free not to share. Pet. App. A3.

nance have failed him. The First Amendment exists to protect the speaker, his students, and the public at large from the ideological prejudices of those in positions of authority in the University. The court of appeals erred gravely in abdicating that function. In this country, the freedom of a professor in a public university to teach is not limited to those who espouse a party line.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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AUGUST 14, 1991

APPENDIX

UNITED STATES COURT OF APPREALS
FOR THE ELEVENTH CIRCUIT

Phillip A. BISHOP, Plaintiff-Appellee,

v.

Aaron M. ARONOV, Winton M. Blount, O.H. Delchamps, Jr., Sandrall Hullett, Guy Hunt, William Henry Mitchell, John T. Oliver, Jr., Thomas E. Rast, Yetta G. Samford, Jr., Martha H. Simms, Wayne Teague, Cleophus Thomas, Jr., George S. Shirley, Cordell Wynn, all in their official capacities as members of the Board of Trustees of the University of Alabama, Defendants-Appellants.

No. 90-7230

United States Court of Appeals,
Eleventh Circuit

March 15, 1991

Kenneth L. Goodwin, Paul E. Skidmore and Stanley J. Murphy, University of Alabama System, Office of Counsel, Tuscaloosa, Ala., for defendants-appellants.

Albert L. Jordan, Wallace, Brooke & Byers, Birmingham, Ala., for plaintiff-appellee,

Appeal from the United States District Court for the Northern District of Alabama.

Before COX and BIRCH, Circuit Judges, and GIBSON*, Senior Circuit Judge.

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*The Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

FLOYD R. GIBSON, Senior Circuit Judge:

The University of Alabama through its Board of Trustees (the "University") appeals the district court's summary judgment and other orders in favor of Assistant Professor Phillip A. Bishop ("Dr. Bishop") enjoining the University from curtailing his speech and religion rights in certain respects.[1] We conclude that the action taken by the University did not transgress constitutional guarantees and proscriptions, and we now reverse.

I. BACKGROUND

Our review of the record reveals that a completely independent statement of the facts would not be useful. We do not disagree with the district court as to any facts, though our views diverge as to the controlling legal principles and the conclusions to be drawn from them. These questions of law we take up presently by a de novo review of the interplay between the facts and law. *See Jones v. Heyman*, 888 F.2d 1328, 1330-31 (11th Cir. 1989) (per curiam) (citations omitted). First, we largely adopt the district court's statement of the facts, quoting freely therefrom and supplementing it as necessary.

> Phillip A. Bishop has been employed as assistant professor in the Area of Health, Physical Education, and Recreation [HPER], in the College of Education at the University of Alabama and Director of its Human Performance Laboratory since 1984. He teaches exercise physiology, his specialty, to graduate and undergraduate students and supervises research problems and theses.
>
> During the fall of 1984 through the spring of 1987 Dr. Bishop occasionally referred to his religious beliefs during instructional time, remarks which he prefaced as personal "bias." Some of his references

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[1]The opinion of the district court is published as *Bishop v. Aronov*, 732 F.Supp. 1562 (N.D.Ala. 1990).

> concerned his understanding of the creative force behind human physiology. Other statements involved brief explantations of a philosophical approach to problems and advice to students on coping with academic stresses. In response to students' questions concerning academic research, publishing, tenure, or promotion, Bishop has suggested to the students that his religious beliefs are more important than academic production, and this perspective allows him to better cope with academic stresses. He never engaged in prayer, read passages from the Bible, handed out religious tracts, or arranged for guest speakers to lecture on a religious topic during instructional time.

Bishop, 732 F.Supp. at 1563.

There are no transcriptions of Dr. Bishop's actual in-class comments. However, attached to his summary judgment motion is an affidavit wherein he affords us an approximation of his remarks.

> The statement [I made to the class] was generally something like the following:
>
> . . .
>
> > After giving it considerable thought, I have decided for myself when I die, I would like to leave behind something more important and valuable than a stack of technical papers. I think that people are important and eternal, paper is neither. I want to invest my time mainly in people. I personally believe God came to earth in the form of Jesus Christ and he has something to tell us about life which is crucial to success and happiness. Now this is simply my personal belief, understand, and I try to model my life after Christ, who was concerned with people, and I feel that is the wisest thing I can do. You need to recognize as my students that this is my bias and it colors everything I say and do. If that is not your bias, that is fine. You need, however, to filter everything I say

> with that (Christian bias) filter. If you observe something in my life that is inconsistent with Christianity, please let me know, because, I believe that it is much more important than a pile of papers.

Affidavit of Phillip A. Bishop at 2, attachment to Plaintiff's Motion for Summary Judgment, Record on Appeal, Vol. 2, Doc. 40 (Hereinafter "Bishop Affidavit").

> In April 1987 Bishop organized an after-class meeting for his students and other interested persons wherein he lectured on and discussed "Evidences of God in Human Physiology." Discussion covered various aspects of the human body including the complexity of its design and operation, concluding that man was created by God and was not the by-product of evolution. The class was attended by five Bishop students and one professor.
>
> [The University] contend[s] that the timing of the class before final exams created the possibility of a coercive effect upon his students, a situation which the Establishment Clause of the Constitution is designed to prohibit. Attendance at the class, however, was voluntary and did not affect grades. Bishop used a blind grading system.
>
> Some of Bishop's students in the 1986-87 classes complained about [Bishop's in-class] comments and the after-class meeting to [Carl] Westerfield [Bishop's supervisor and Head of HPER]. In late August or early September 1987 Westerfield met with the Dean of the College of Education, Rodney Roth, to discuss the complaints. After deciding Bishop's statements were inappropriate, they met with University counsel September 11, 1987.

Bishop, 782 F.Supp. at 1564.

Westerfield prepared a memorandum to "Dr. Phil Bishop" concerning his conduct. The memo regards "Religious Activities in a Public Institution" and reads as follows:

> Foremost, I want to reaffirm our commitment to your right of academic freedom and freedom of religious belief. This communication should not be construed as an attempt to interfere with or suppress your freedoms. From discourse with you and others, I feel that certain actions on your behalf are unwarranted at a public institution such as The University of Alabama and should cease. Among those actions that should be discontinued are: 1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a "Christian Perspective" of an academic topic is delivered. I must also remind you that religious beliefs and/or the strength of a belief can not be utilized in the decisions concerning the recruitment, admission or retention of graduate students.

Record Excerpt at 15.[2] (Hereinafter the "memo"). The tenor of this document demonstrates the first amendment tight rope upon which the University found itself perched. Without unnecessarily restricting the academic freedom of a faculty member, the University endeavored to avoid both Establishment Clause violations and undue pressure upon students. The University's counsel believed that under *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (excessive entanglement between government and religion), Dr. Bishop's activities did amount to such violations, thus the University refused the professor's later requests to rescind the Westerfield order. In the interim, Dr. Bishop apparently complied with the University's wishes.

> In May 1988 Bishop [through letter of his counsel] petitioned the President of the University to rescind the order. [Bishop] was again advised there would be

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[2]This last sentence refers to a suggestion by Bishop to the faculty that the department make an effort to recruit graduate students who had strong Christian backgrounds and beliefs. The right of Bishop to make such suggestions or of the University to make such decisions is not before the court, though surely the former can, while the latter cannot.

> no rescission of the University prohibition and he should refrain from interjecting his religious preferences and/or beliefs not necessary to class discussion or class materials. The University viewed the holding of any optional class meeting to discuss religious implications of class material prior to the submission of final grades to be coercive and [,] therefore, prohibited.
>
> Numerous undisputed affidavits filed indicate University policy does not prohibit faculty members from engaging in non-religious classroom speech involving personal views on other subjects. Such discussions are the norm used to establish rapport between faculty and students. There is no University policy attempting to control the statements of faculty members as long as they do their job. Nor is there a University policy prohibiting faculty members from organizing after-class meetings if discussions are not from a religious perspective. The University has no policy proscribing professor involvement in extracurricular academic discussions with students.

Bishop, 732 F.Supp. at 1564.

In light of the continued restriction of his speech in a manner apparently contradictory to the University's erstwhile declarations of academic freedom, Dr. Bishop filed suit in federal district court against the Board of Trustees of the University in their official capacities under 42 U.S.C. § 1983, seeking only declaratory and injunctive relief for violations of his free speech rights by imposition of Westerfield's memo. The initial complaint also claimed that the memo was voidable for vague and overbroad restrictions of his free speech rights. By amendment to his complaint, Dr. Bishop also pleaded violations of his free exercise rights and his rights under the ninth amendment.[3] In significant parts the University's answer and amended answer generally denied any First and Ninth Amend-

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[3]All of Dr. Bishop's First Amendment claims against the University are, of course, made by incorporation through the Fourteenth Amendment.

ment violations and raised the Establishment Clause of the United States and Alabama Constitutions as affirmative defenses.

After cross-motions for summary judgment, the district court relied on *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), and determined that "[t]he University has created a forum for students and their professors to engage in a free interchange of ideas[,]" *Bishop*, 732 F.Supp. at 1566, and that "Bishop's speech connected with his after-class meeting is part of an open exchange of ideas between students and faculty[,]" *id.* at 1567. The court concluded that the Westerfield memo was overbroad and vague because "[i]t reaches statements not violative of the Establishment Clause and fails to provide adequate notice of the proscribed speech." *Id.* at 1566. As for the University's claim of an Establishment Clause violation by Dr. Bishop's actions, the district court found that his conduct had a primarily secular purpose which did not amount to an establishment of religion under *Lemon*. *Id.* at 1567.

The district court summed up its thinking as follows:

> The University has no interest sufficient to justify restricting a professor's freedom to make occasional classroom comments about personal religious beliefs or to restrict him from holding after-class meetings with students on state university property to discuss a Christian perspective on academic topics. [Bishop] is entitled to summary judgment.

Id. at 1568. The final order entered by the district court granted summary judgment to Dr. Bishop and otherwise ordered that 1) the University be "enjoined from taking any action restricting [Dr. Bishop]'s first amendment rights of academic speech and religion[;]" 2) the University be "enjoined from restricting [Dr. Bishop]'s classroom speech as long as it does not exceed the parameters of speech outlined in this opinion[;]" 3) "[Dr. Bishop] be allowed to hold his special class in a University building only if permission is sought and

only if he assures the class that a blind grading system is used[;]" 4) "the University may not unreasonably withhold permission for the plaintiff to hold his special class in a University building[;]" and 5) "if [Dr. Bishop] decides to hold his special class at some place other than a University building he must assure the class that a blind grading system is used." *Id.* at 1569. The University appeals this final order of summary judgment.

II. DISCUSSION

A. Open Forum

First amendment doctrines are manifold, and their diverse facts and analyses may reveal but one consistent truth with respect to the amendment — each case is decided on its own merits. Nevertheless, a correct legal analysis must predicate proper explication of the constitutionally pivotal facts. This is not a forum case. We disagree with the district court's conclusion that a university classroom is an open forum during instructional time.

In deciding that a school newspaper published by a journalism class was not a public forum, the Supreme Court restated the examination to be made:

> [S]chool facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 47 [103 S.Ct. 948, 956, 74 L.Ed.2d 794] (1983), or by some segment of the public, such as student organizations. *Id.* at 46, n. 7 [103 S.Ct. at 955 n. 7] (citing *Widmar v. Vincent*). If the facilities have instead been reserved for other intended purposes . . . then no public forum has been created, and school officials may impose *reasonable restrictions* on the speech of students, teachers, and other members of the school community.

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267, 108 S.Ct. 562, 568, 98 L.Ed.2d 592 (1988) (emphasis added). While the University may make its classrooms available for other purposes, we have no doubt that during instructional periods the University's classrooms are "reserved for other intended purposes," *viz.*, the teaching of a particular university course for credit. Thus, we hold that Dr. Bishop's classroom is not an open forum. The next issue to determine is whether the University by its memo has reasonably restricted Dr. Bishop's speech or exercise rights therein.

B. Free Speech[4]

1. *Overbreadth*

First we take Dr. Bishop's facial charges of overbreadth and vagueness, for if correct, no closer, substantive inquiry would be necessary. However, we find the memo's restrictions to be neither overbroad nor vague. We recognize that the memo is less than ideal. While counsel for Dr. Bishop has raised several nice questions about the reach of the memo, they are more imagined than genuine. The restrictions reach only course-related, in-class remarks of Dr. Bishop and his "optional" classes. We take this view of the memo under our "obligation to construe the challenged [restrictions] narrowly[.]" *See American Booksellers v. Webb*, 919 F.2d 1493, 1500 (11th Cir. 1990). "It has long been a tent of First Amendment law that in determining a facial challenge to a statue [here the memo], if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld." *Id.* (quoting *Virginia v. American Booksellers Association*, 484 U.S. 383, 397, 108 S.Ct. 636, 644-45, 98 L.Ed.2d 782 (1988) (citations omitted) (subsequent history omitted)) (footnote omitted).

Because the University's memo responded to particular conduct by Dr. Bishop, we believe it can be said to be " 'readily

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[4]"Congress shall make no law . . . abridging the freedom of speech. . . . " U.S. Const. amend. I.

susceptible' to a narrowing construction." We conclude that the University' restrictions as expressed in its memo are sufficiently narrow and clear to put Dr. Bishop on notice of what he cannot do and do not reach otherwise protected speech. We are confident that, as a professional, Dr. Bishop knows that the University asks only that he separate his personal and professional beliefs and that he not impart the former to his students during "instructional time" or under the guise of the courses he teaches in so-called optional classes.

To suggest that the memo is vague (and a vagary) Dr. Bishop has tried to make much of the fact that the University has no policy for limiting the speech of its professors only to their subject areas. One would not expect to find such a policy, and to the contrary, as one would expect, there are various indications (as in the memo itself) that the University generally endorses academic freedom for its faculty. *See Bishop*, 732 F.Supp. at 1564. Dr. Bishop has filed numerous affidavits by other instructors at the University describing their extra curricular speech in the classroom as efforts to reach out to students. *Id.* These attempts at professor-student affinity are laudable. But plainly some topics understandably produce more apprehension than comfort in students. Just as women students would find no comfort in an openly sexist instructor, an Islamic or Jewish student will not likely savor the Christian bias that Dr. Bishop professes, much less seek camaraderie by trying to discover "something in [Dr. Bishop's] life that is inconsistent with Christianity." Bishop Affidavit at 2. The opposite effect was apparently achieved. There is no suggestion that any other professor has produced student complaints or struck constitutional chords. Because the University may heretofore not have restricted the classroom speech of any other professor does not make out a case of overbreadth, vagueness, or infringement as to Dr. Bishop.

2. *Much Extant (but ultimately inconclusive) Case Law*

Though the religion clauses are implicated because of the indisputably religious character of Dr. Bishop's remarks, the

primary analysis that must be made here ascends from the cases that discuss the free speech rights of public teachers.[5] While neither teachers nor students "shed their constitutional rights to [free speech] at the schoolhouse gate[,]" *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969).

> the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering v. Board of Education, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811 (1968). Teachers cannot suffer reprisal for speaking on a matter of public concern by speech which they would be entitled to make as private persons unless that speech "impeded [their] proper performance of . . . daily duties in the classroom or . . . interfered with the regular operation of the schools generally." *Id.* at 572-73, 88 S.Ct. at 1737 (footnote omitted). Though *Pickering* addresses only out-of-school speech by teachers, we take it as our starting point because of the balancing it suggests. In and out of school, some balance must be reached.[6]

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[5]A thoughtful examination of the speech rights of teachers is made in Note, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U.L.Rev. 693 (1990). The article suggests a balancing approach somewhat like the one we will endeavor to apply. The article, however, weighs teacher autonomy more heavily than we have concluded is proper under *Kuhlmeier*.

[6]In a case decided soon after *Pickering*, the former Fifth Circuit noted the necessity of framing a balance between school and teacher interests. *Pred v. Board of Public Instruction of Dade County, Fla.*, 415 F.2d 851, 855-59 (5th Cir. 1969). Though the case only reversed for improvident dismissal of the

The following term, the Supreme Court decided *Tinker*. The Court encountered the free expression rights (exercised by wearing black armbands) claimed by students. The case describes a standard by which to gauge restriction of in-class expression:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

Burnside v. Byars, [363 F.2d 744], 749 [(5th Cir. 1966)].

> In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students.

Tinker, 393 U.S. at 509, 89 S.Ct. at 738. While *Tinker* deals with in-class conduct, and reiterates the belief that such conduct cannot be entirely unfettered, the case involves students, not teachers. We do not believe that the "material and substantial interference" test applied to student expression can control this case.

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teacher's complant by the district court and did not reach any facts of record or suggest a particular analysis, the opinion by then-Chief Judge John R. Brown provides a helpful discussion of the relevant First Amendment law to date.

The Tenth Circuit has recently decided a more factually similar case that instructively relies on *Tinker* to evaluate a school's decision to require a fifth-grade teacher to remove certain texts from his classroom library and to refrain from silently reading the Bible during an in-class reading time. *Roberts v. Madigan*, 921 F.2d 1047, 1056-57 (10th Cir. 1990). However, the real foundation for our Sister Circuit's conclusion seems to be *Kuhlmeier*. Thereunder, the Tenth Circuit found support for restriction of a teacher's activity where "the [teacher's] conduct endorses a particular religion and is an activity 'that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school[.]' " *Id.* at 1057 (quoting *Kuhlmeier*, 484 U.S. at 271, 108 S.Ct. at 569).

The key difference between *Roberts* and *Tinker* lies in the actor. While a student's expression can be more readily identified as a thing independent of the school, a teacher's speech can be taken as directly and deliberately representative of the school. Hence, where the in-class speech of a teacher is concerned, the school has an interest not only in preventing interference with the day-to-day operation of its classrooms as in *Tinker*, but also in scrutinizing expressions that "the public might reasonably perceive to bear [its] imprimatur[.]" *Id.*

This Court has also indicated how *Tinker* can be distinguished from *Kuhlmeier*. In *Alabama Student Party v. Student Government Association*, 867 F.2d 1344 (11th Cir. 1989), then-Chief Judge Roney wrote:

> The [Supreme] Court recognized there is a difference between speech a school must *tolerate* and speech a school must affirmatively promote. In [*Kuhlmeier*], the school could determine what was appropriate in a school-sponsored student newspaper when that newspaper was legitimately part of the learning experience, the curriculum, of the school.
>
> . . . .
>
> The University should be entitled to place reasonable restrictions on this learning experience.

Id. at 1347 (emphasis in original).

The question becomes to what degree a school may control classroom instruction before touching the First Amendment rights of a teacher. "Courts agree . . . that the school's administration may at least establish the parameters of focus and general subject matter of curriculum." *Mahoney v. Hankin*, 593 F.Supp. 1171, 1174 (S.D.N.Y. 1984) (citing *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972, 93 S.Ct. 2148, 36 L.Ed.2d 695 (1973)). *Mahoney* goes on to discuss two circuit court decisions that weigh the interests of the school against the "teacher's pedagogical choices." *Id.* at 1175 (citing *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971) (per curiam) and *East Hartford Educ. Association v. Board of Ed. of Town of East Hartford*, 562 F.2d 838, 843-44, *vacated on rehearing en banc*, 562 F.2d 856 (2d Cir. 1977)) (footnote omitted).

The Second Circuit case dealt with a faculty dress code that was upheld on summary judgment by the district court and ultimately upheld by the Second Circuit sitting *en banc*. Judge Meskill wrote the opinion for the *en banc* majority. His dissent from the panel opinion included the following salient remark: "the First Amendment leaves undisturbed the power of local officials to prescribe the curriculum and teaching techniques of the schools in their care." *East Hartford*, 562 F.2d at 851 (Meskill, J., dissenting) (footnote omitted). The First Circuit case dealt with the dismissal of a public school teacher for an alleged violation of a Code of Ethics. Though a brief per curiam, the opinion remarks astutely that:

> free speech does not grant teachers a license to say or write in class whatever they may feel like, and . . . the propriety of regulations or sanctions must depend on such circumstances as the age and sophistication of the students, the closeness of the relation between the specific technique used and some concededly valid educational objective, and the context and manner of presentation.

Mailloux, 448 F.2d at 1243. Yet, neither of these cases precisely matches the facts of our case. Thus, as the First Circuit further noted, "we see no substitute for a case-by-case inquiry into

whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech." *Id.*

3. *Our Suggested And Applied Balance*

Because there are no cases satisfactorily to point with this one to adopt as controlling, we must frame our own analysis to determine the sufficiency of the University's interests in restricting Dr. Bishop's expression in the classroom. The balance we suggest, though somewhat amorphous, takes as its polestar *Kuhlmeier*'s concern for the "basic educational mission" of the school which gives it authority by the use of "reasonable restrictions" over in-class speech that it could not censor outside the classroom. *Kuhlmeier*, 484 U.S. at 266-67, 108 S.Ct. at 567-68 (citations omitted).

> [W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student [or professor] expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student [or professor] speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.
>
> This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.

Id. at 272-73, 108 S.Ct. at 570-71 (footnotes and citations omitted). *Kuhlmeier*, like most cases we have encountered, dealt with students at the secondary level. Yet, insofar as it covers the extent to which an institution may limit in-school expressions which suggest the school's approval, we adopt the

Court's reasoning as suitable to our ends, even at the University level.

In an effort to calibrate the Constitution in this case, we contemplate much. First and foremost, we consider the context: the university classroom during specific in-class time and the visage of the classroom as part of a university course in an after-class meeting. This context also leads us to consider the coercive effect upon students that a professor's speech inherently possesses and that the University may wish to avoid. The University's interest is most obvious when student complaints suggest apparent coercion — even when not intended by the professor.

Second, it follows, we consider the University's position as a public employer which may reasonably restrict the speech rights of employees more readily than those of other persons. As a place of schooling with a teaching mission, we consider the University's authority to reasonably control the content of its curriculum, particularly that content imparted during class time. Tangential to the authority over its curriculum, there lies some authority over the conduct of teachers in and out of the classroom that significantly bears on the curriculum or that gives the appearance of endorsement by the university.

Last and somewhat countervailing, we consider the strong predilection for academic freedom as an adjunct for the free speech rights of the First Amendment. There are abundant cases which acclaim academic freedom. Perhaps the most applicable is *Keyishian v. Board of Regents,* 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), in which Justice Brennan wrote:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcending value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of

> American school." The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."

Id. at 603, 87 S.Ct. at 683-84 (citations omitted). *Keyishian* dealt with that brand of regulation most offensive to a free society: loyalty oaths. The Court's pronouncements about academic freedom in that context, however, cannot be extrapolated to deny schools command of their own courses. As this court has said in a case deciding the power of the University to regulate student government elections:

> The University judgment on matters such as this should be given great deference by federal courts. This Court should honor the traditional "reluctance to trench on the prerogatives of state and local educational institutions." *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 226, 106 S.Ct. 507, 514, 88 L.Ed.2d 523 (1985). The reason for this is that "[a]cademic freedom thrives not only on the independent uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself." *Id.* at 226 n. 12, 106 S.Ct. at 514, n. 12 (citations omitted). In the present case, and in other school cases raising similar First Amendment challenges, these principles translate into a degree of deference to school officials who seek to reasonably regulate speech and campus activities in furtherance of the school's educational mission.

Alabama Student Party, 867 F.2d at 1347; *see also Virgil v. School Bd. of Columbia County, Fla.*, 862 F.2d 1517, 1520 (11th Cir. 1989) ("[i]n matters pertaining to the curriculum, educators have been accorded greater control over expression than they may enjoy in other spheres of activity.") (citing *Kuhlmeier*).

Though we are mindful of the invaluable role academic

freedom plays in our public schools, particularly at the post-secondary level, we do not find support to conclude that academic freedom is an independent First Amendment right. And, in any event, we cannot supplant our discretion for that of the University. Federal judges should not be ersatz deans or educators. In this regard, we trust that the University will serve its own interests as well as those of its professors in pursuit of academic freedom. University officials are undoubtedly aware that quality faculty members will be hard to attract and retain if they are to be shackled in much of what they do.

With these considerations in mind, we turn to the case at hand. The University, by its memo from Dr. Westerfield, responded to complaints about Dr. Bishop's religious references by some of his students and, therefore, restricted the instructional activities of Dr. Bishop as to religious intimations. The restrictions placed on Dr. Bishop by the University were that he refrain from "1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a 'Christian Perspective' of an academic topic is delivered." Record Excerpt at 15.

We read the memo's restrictions narrowly because they implicate First Amendment freedoms. They apply only to the classroom speech of Dr. Bishop — wherever he purports to conduct a class for the University. At those times and places, he may not interject his religious views into the course material. Of course, if a student asks about his religious views, he may fairly answer the question. Under the memo, the University seeks only to prevent Dr. Bishop from making assertions about his religious beliefs vis-a-vis the subject matter of his courses.

Dr. Bishop has expressed certain personal (perhaps even professional) opinions about his work that happen to have a religious source.[7] The University has concluded that these

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[7]In this respect, Dr. Bishop's efforts to identify a personal bias, present it to his students, and hold it up for criticism are admirable. We are not convinced, however, that Dr. Bishop has fully comprehended the separation

opinions should not be represented in the courses he teaches at the University. The University has not suggested that Dr. Bishop cannot hold his particular views; express them, on his own time, far and wide and to whomever will listen; or write and publish, no doubt authoritatively, on them; nor could it so prohibit him. The University has simply said that he may not discuss his religious beliefs or opinions under the guise of University courses.

The University's chief concern is that its courses be taught without personal religious bias unnecessarily infecting the teacher or the students. Dr. Bishop's interest in academic freedom and free speech do not displace the University's interest inside the classroom. Contrary to the district court, *Bishop*, 732 F.Supp. at 1568, we find that the University's interests in the classroom conduct of its professors are sufficient, in the balance we have suggested, to warrant the reasonable restrictions it has imposed on Dr. Bishop. Under the analysis by which we have examined the University's action, we do not discover an infringement of Dr. Bishop's free speech rights.

As for the after-class meetings, the University has concluded that meetings on the evidence of God in human physiology or from a "Christian perspective" cannot be conducted by Dr. Bishop in a manner that connects them to the courses he teaches. The University has not suggested that Dr. Bishop cannot organize such meetings, make notice of them on campus, or request University space to conduct them; nor could it so prohibit him. The University has simply said he may not hold such meetings as classes related to the courses he teaches. The

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of his personal views from his professorial duties that the University demands. He has said that his Christian perspective touches everything he says and does. In this regard, while we respect Dr. Bishop's professional views as informed by his religious beliefs, we point out that the two have to be conceptually separated for fair analysis. That is, simply renaming religious views as professional, no matter how well-founded (and we are in no position to gauge that) does not deny the authority of his employer to request that he sequester the personal from the professional nor dismiss the specter of an establishment violation.

phrasing "optional class" or "optional meeting" and the scheduling before finals gave the impression of official sanction, which might have unduly pressured students into attending and, at least for purposes of examination, into adopting the beliefs expressed by Dr. Bishop. The University may seek to avoid these consequences, even where unintended. Conversely, when Dr. Bishop makes it plain to his students that such meetings are not mandatory, not considered part of the course work, and not related to grading, the University cannot prevent him from conducting such meetings, nor has it.

Fairly read, the phrasing "optional classes" in the University's memo plainly requires Dr. Bishop to completely disassociate such meetings from his courses. This simple restriction, put into the applicable balance we have outlined, is reasonable and supported by sufficient University interests as we have indicated. Again, we do not discover an infringement of Dr. Bishop's free speech rights.

In short, Dr. Bishop and the University disagree about a matter of content in the courses he teaches. The University must have the final say in such a dispute. Though Dr. Bishop's sincerity cannot be doubted, his educational judgment can be questioned and redirected by the University when he is acting under its auspices as a course instructor, but not when he acts as an independent educator or researcher. The University's conclusions about course content must be allowed to hold sway over an individual professor's judgments. By its memo to Dr. Bishop, the University seeks to prevent him from presenting his religious viewpoint during instructional time, even to the extent that it represents his professional opinion about his subject matter. We have simply concluded that the University as an employer and educator can direct Dr. Bishop to refrain from expression of religious viewpoints in the classroom and like settings.

C. The Religion Clauses[8]

1. *Free Exercise*

Though Dr. Bishop's amended complaint raises his exericse rights, we find his arguments do not merit our close attention. As we have noted, the religious facets of this case cloud its true countenance. We are not persuaded that, even in the remotest sense, Dr. Bishop's rights of free exercise or worship as those concepts are comprehended in constitutional parlance are implicated. He has made no true suggestion, much less demonstration, that any proscribed conduct of his impedes the practice of his religion. In fact, he has been careful to avoid ascribing his beliefs to a particular religion and to avoid describing his conduct as so connected, other than to say his values are Christian in a broad and unspecific sense. Furthermore, the University's restrictions on him are not directed at his efforts to practice religion, *per se,* but rather are directed at his practice of teaching. If either Dr. Bishop's or the University's conduct truly went to the exercise of religion by Dr. Bishop, no doubt the Establishment Clause would resolve the case. As it is before us, we see no free exercise question.

2. *Establishment of Religion*

The University issued its memorandum purportedly to avoid an establishment of religion by Dr. Bishop's conduct which connected the University to a particular religious viewpoint. Such a connection can give the impression that the University sponsors that viewpoint. Because of the potential establishment conflict, even the appearance of proselytizing by a professor should be a real concern to the University. If a clear establishment violation existed, this case would be over, without resort to the evaluation we have already made. *See*

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[8]"Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof. . . . " U.S. Const. amend. I.

Roberts, 921 F.2d at 1053-56. While we do not reach the question, we note that Dr. Bishop's optional class was particularly suspect. The creation/design aspect of his lecture could have lent itself to an analysis as found in *Edwards v. Aquillard*, 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987). In any event, we do not reach the establishment questions raised by Dr. Bishop's conduct. The University can restrict speech that falls short of an establishment violation, and we have already disposed of the University's restrictions of Dr. Bishop under the free speech clause.

On the other hand, Dr. Bishop has suggested that the University's restrictions are themselves an establishment of religion because they exclude only Christian viewpoints. We disagree. Applying *Lemon*, 1) the University's restrictions have only a secular purpose — by limiting Dr. Bishop's religious remarks the University does not endeavor to promote other religions or religious viewpoints; 2) the restrictions neither advance nor inhibit religion — to the contrary, the University has simply attempted to maintain a neutral, secular classroom by its restrictions on Dr. Bishop's expressions; and finally, 3) the University's restrictions do not promote excessive entanglement with religion — again, the University seeks only to extricate itself from any religious influence or instruction in its secular courses. *See Lemon*, 403 U.S. at 612-13, 91 S.Ct. at 2111.

We also note that the memo excludes Christian viewpoints alone because it is addressed to Dr. Bishop, who expressed them alone. No other complaints presented to the University as to other religious viewpoints are before the court. Should another professor express religious beliefs in the classroom, the University would likely produce a similar memo. Heretofore, the University has apparently not found it necessary to remind its faculty that the expression of a religious position in a secular subject, no matter how carefully presented, creates the appearance of endorsement of that position by the University and engenders anxiety in students who may feel compelled to feign a similar belief and, worse still, deny their own beliefs. By its effort to avoid endorsement of Dr. Bishop's reli-

gious ideas in its classrooms, the University's memo does not create an establishment of religion.

III. CONCLUSION

We hold that the University's restrictions with respect to classroom conduct issued under its authority to control curriculum do not infringe the free speech or free exercise rights of Dr. Bishop as discussed above. The memo proscribes particular conduct of Dr. Bishop so that he can know what the University does not want him to do. However, balanced against the interests of academic freedom, the memo cannot proscribe Dr. Bishop's conduct to an extent any greater than we have indicated by our opinion.

We also hold that the memo's restriction with respect to the optional after-class meeting did not infringe on Dr. Bishop's free speech or free exercise rights. Under its authority to control curricular conduct, the University may restrict a professor from conducting an "extra" or "optional" class or meeting under the patronage of a university course. In particular, scheduling the class directly before finals and describing it as an "optional class" can be prohibited to avoid the apparent sponsorship of the University. However, like the district court, we hold that the University cannot prevent Dr. Bishop from organizing such a meeting for interested persons, either on or off University grounds. Should Dr. Bishop again conduct such meetings and invite his students, the University may direct that Dr. Bishop make it clear to students that the meeting is neither required for course credit nor sanctioned by the University and that Dr. Bishop employ blind-grading and so assure students.

We do not reach the question of establishment of religion by Dr. Bishop.[9] While the University acted on its conclusions

[9]We also do not reach the Alabama Constitution or the ninth amendment of the United States Constitution. Dr. Bishop only pleaded the ninth amendment in the barest language. His appellate arguments do not even attempt to skeletally state a ninth amendment case. Whatever rights the

in that regard, we hold that its memo was reasonable and within its powers to control the content of curriculum in the classroom, regardless of the Establishment Clause. The University necessarily has dominion over what is taught by its professors and may so manage them. We finally hold that the University's memo does not create an establishment of religion; rather, it seeks to avoid an entanglement with religion and furthers the unstated but accepted principle of separation of church and state.

We direct the district court to enter summary judgment for the University and against Dr. Bishop consistent with this opinion. As indicated, the judgment and order of the district court are

REVERSED.

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ninth amendment does ensconce, we are confident that Dr. Bishop's case arises and concludes under the first amendment.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

Phillip A. BISHOP, Plaintiff,

v.

Aaron M. ARONOV, Winton M. Blount, O.H. Delchamps, Jr., Sandral Hullett, Guy Hunt, William Henry Mitchell, John T. Oliver, Jr., Thomas E. Rast, Yetta G. Samford, Jr., Martha H. Simms, Wayne Teague, Cleophus Thomas, Jr., George S. Shirley, Cordell Wynn, all in their official capacities as members of the Board of Trustees of the University of Alabama, Defendants.

Civ. A. No. 88–G–1591–S.

United States District Court,
N.D. Alabama, S.D.

Feb. 26, 1990.

Albert L. Jordan, Wallace Brooke & Byers, Birmingham, Ala., for plaintiff.

Kenneth L. Goodwin, Paul E. Skidmore, and Stanley J. Murphy, University of Alabama System Office of Counsel, Tuscaloosa, Ala., for defendants.

MEMORANDUM OPINION

GUIN, District Judge.

In the case at bar the court has been asked to decide whether there has been a violation of the Establishment Clause of the Constitution, set forth below, in light of the actions of both the plaintiff and the defendants [hereinafter the University]:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof: or abridging the freedom of speech . . .

Plaintiff Phillip A. Bishop has been employed as assistant professor in the Area of Health, Physical Education, and Recreation, in the College of Education at the University of Alabama and Director of its Human Performance Laboratory since 1984. He teaches exercise physiology, his specialty, to graduate and undergraduate students and supervises research problems and theses.

During the fall of 1984 through the spring of 1987 Dr. Bishop occasionally referred to his religious beliefs during instructional time, remarks which he prefaced as personal "bias." Some of his references concerned his understanding of the creative force behind human physiology. Other statements involved brief explanations of a philosophical approach to the problems and advice to students on coping with academic stresses. In response to students' questions concerning academic research, publishing, tenure, or promotion, Bishop has suggested to the students that his religious beliefs are more important than academic production, and this perspective allows him to better cope with academic stresses. He never engaged in prayer, read passages from the Bible, handed out religious tracts, or arranged for guest speakers to lecture on a religious topic during instructional time.

Bishop is regarded as an excellent professor by his supervisor, Head of the Health, Physical Education and Recreation Department, Carl Westerfield, who recommended him for early tenure. Defendants admit he is a capable teacher.

Bishop has an excellent record of publishing. Since 1984 he has authored or co-authored more published articles in journals related to his academic discipline than any other assistant professor in the area of health, physical education, and recreation at the University.

In April 1987 Bishop organized an after-class meeting for

his students and other interested persons wherein he lectured on and discussed "Evidences of God in Human Physiology." Discussion covered various aspects of the human body including the complexity of its design and operation, concluding that man was created by God and was not the by-product of evolution. The class was attended by five Bishop students and one professor.

Defendants contend the timing of the class before final exams created the possibility of a coercive effect upon his students, a situation which the Establishment Clause of the Constitution is designed to prohibit. Attendance at the class, however, was voluntary and did not affect grades. Bishop used a blind grading system.

Some of Bishop's students in the 1986-87 classes complained about the comments and the after-class meeting to Westerfield. In late August or early September 1987 Westerfield met with the Dean of the College of Education, Rodney Roth, to discuss the complaints. After deciding Bishop's statements were inappropriate, they met with University counsel September 11, 1987. Thereafter, Westerfield drafted Bishop a memorandum instructing him to refrain from "1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a 'Christian Perspective' of an academic topic is delivered." The plaintiff has complied with the directive.

Although Bishop tried to have the order rescinded during the fall of 1987, his efforts were unsuccessful. The University, upon the advice of University counsel, advised him that as owner of the teaching facilities the University had the right to establish curriculum: it had not improperly interfered with academic freedom. It has a duty to act against Bishop to prevent an establishment of religion under the three-part test set out in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745, *reh'g denied*, 404 U.S. 876, 92 S.Ct. 24, 30 L.Ed.2d 123 (1971), set forth below:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . .; finally, the statute must not foster "an excessive government entanglement with religion." (Citations omitted).

Id., 403 U.S. at 612-13, 91 S.Ct. at 2111, 29 L.Ed.2d at 755 (interpretation of statutes providing state aid to church-related elementary and secondary schools).

University counsel opined that Bishop's comments lacked a secular purpose and had the effect of benefiting one religious point of view.

In May of 1988 Bishop petitioned the President of the University to rescind the order. He was again advised there would be no rescission of the University prohibition and he should refrain from interjecting his religious preferences and/or beliefs not necessary to class discussion or class materials. The University viewed the holding of any optional class meeting to discuss religious implications of class material prior to the submission of final grades to be coercive and therefore, prohibited.

Numerous undisputed affidavits filed indicate University policy does not prohibit faculty members from engaging nonreligious classroom speech involving personal views on other subjects. Such discussions are the norm used to establish rapport between faculty and students. There is no University policy attempting to control the statements of faculty members as long as they do their job. Nor is there a University policy prohibiting faculty members from organizing after-class meetings if discussions are not from a religious perspective. The University has no policy proscribing professor involvement in extracurricular academic discussions with students.

Plaintiff filed suit September 21, 1988, against the individual members of the University Board of Trustees in their official capacities. The complaint, as amended, claims violations of his first and ninth amendment rights of speech and

religion, applicable to the states through the fourteenth amendment. *Baird v. State Bar,* 401 U.S. 1, 5, 91 S.Ct. 702, 705, 27 L.Ed.2d 639 (1971). He further claims the restrictions to be vague and over broad.

In answer, the defendants claim it was their duty to restrict Bishop's speech which was violative of both the Establishment Clause of the United States Constitution and the Establishment Clause of the Alabama Constitution, article 1, section 3.

Cross motions for summary judgement were filed.

These facts necessitate interpretation of the Establishment Clause, specifically the following issues:

1. Does the University have the right to limit the topics which may be discussed in its classes?
2. Does a state university interest in preventing an establishment of religion authorize it to restrict its professors' freedom to make occasional classroom statements about personal religious views?
3. Does the same interest justify restricting a professor from holding after-class meetings with students on state university property to discuss a Christian perspective on academic topics?
4. Are the defendant's restrictions void for vagueness or because they are over broad?
5. Do the activities of Dr. Bishop violate the Establishment Clause of the first amendment?

While the law recognizes the right of universities to control the use of its faculties and the subject matter taught therein, it, nevertheless, has established that the first amendment rights of speech and association extend to the campuses of colleges and universities. Any restriction on those rights require strict scrutiny. *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (State university's refusal to grant student religious groups access to university facilities generally open to student groups, held unjustifiable, content based exclusion of religious speech). *Widmar* stands squarely for the proposition that government cannot redefine, under the guise of "aca-

demic judgement," an otherwise open forum to exclude religious matters.

University professors are entitled to freedom of speech in their jobs. *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). Pertinent portions follow:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection." . . . In *Sweezy v. New Hampshire*, 354 U.S. 234, 250, 1 L. ed [sic] 2d 1311, 1324, 77 S Ct 1203 [1211], we said:
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> "The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and evaluate, to gain new

> maturity and understanding; otherwise our civilization will stagnate and die."
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> . . . . .
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> "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." . . . When one must guess what conduct or utterances may lose him his position, one necessarily will "steer far wider of the lawful zone. . . ."

Id. 385 U.S. at 603, 87 S.Ct. at 683, 17 L.Ed.2d at 640–41. *See Healy v. James,* 408 U.S. 169, 180–81, 92 S.Ct. 2338, 2345–46, 33 L.Ed.2d 266 (1972) ("The college classroom with its surrounding environs is peculiarly 'the marketplace of ideas.' "); *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731, 737 (1969) (extended the rights of free speech under the first amendment into the classroom when it held neither teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); *Sweezy v. New Hampshire,* 354 U.S. 234, 77 S.Ct. 1203, 1 L.Ed.2d 1311 (1957), *reh'g denied,* 355 U.S. 852, 78 S.Ct. 7, 2 L.Ed.2d 61 (1957), (classroom advocacy of Marxism).

Since the University has taken the position that plaintiff has no first amendment right of expression at stake in its decision restricting inclusion of religious matters in his courses, any effort to exclude religious matters from Dr. Bishop's speech must be carefully scrutinized. The University "must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." *Widmar,* 454 U.S. at 270, 102 S.Ct. at 274, 70 L.Ed.2d at 448. It is not enough to say the plaintiff is free to believe as he wishes or free to act on his beliefs when he is not performing duties within the scope of his employment.

The interests of the state must be balanced against the rights of free speech of faculty members. *Trotman v. Board of Trustees of Lincoln University,* 635 F.2d 216 (3d Cir.1980), *cert. denied, Lincoln University v. Trotman,* 451 U.S. 986, 101 S.Ct.

2320, 68 L.Ed.2d 844 (1981). Faculty members are at liberty to divulge personal views in the classroom as long as they are not disruptive of classroom activities. *Cooper v. Ross,* 472 F.Supp. 802, 810 (E.D.Ark.1979). The *Cooper* court held an instructor's announcement that he was a communist did not "materially or substantially disrupt his classes." *Id.* It concluded that "in the context of a university classroom, Cooper had a constitutionally protected right simply to inform his students of his personal political and philosophical views." The court did not extend its holding to imply that a teacher has the right to proselytize students or to devote so much of class time to such matters that instruction of the subject matter is impaired. *Id.* at 811 n. 5. Neither does this court. Bishop's actions do not rise to that level. Expression of his personal views has not been disruptive and has not interfered with his teaching which is viewed as commendable.

The University has created a forum for students and their professors to engage in a free interchange of ideas. It may not exclude disfavored religious speech unless the exclusion is necessary to further a compelling governmental interest and narrowly tailored to further that interest. The plaintiff maintains the University's restriction, rather than being specifically tailored, is vague and over broad. He steers away from legitimate areas of study: theories of physiology as taught in medieval European universities—evolution—Creationism. Since their study would necessarily "interject religious beliefs" or "Christian Perspective," he is uncertain if their mention is banned by the University restriction.

The Court holds the University restriction which limits all expression of personal religious views as "unwarranted" is vague and over broad. It reaches statements not violative of the Establishment Clause and fails to provide adequate notice of the proscribed speech. The state's interest in disestablishment cannot overcome federal free speech rights. *Widmar,* 454 U.S. at 275–76, 102 S.Ct. at 277.

The University's only justification for exclusion is an effort to avoid an establishment of religion. This is not sufficiently

compelling to support a content-based discrimination against plaintiff's extracurricular on-campus discussions with students or his in-class statements. Bishop's speech connected with his after-class meeting is part of an open exchange of ideas between students and faculty. As such it is protected by the first amendment. A meeting between Bishop and students to discuss subjects of mutual interest is consistent with the University's educational purpose and consistent with the practices of other professors who participate in such meetings. Furthermore, a court sees no difference in constitutional principle between Bishop's addressing a Christian student organization on campus, announcing to his students that he would be speaking, and inviting them to attend the meeting, as allowed by Dr. Westerfield, and Bishop's making the comments to his classes, either regular or optional, which are the subject of his suit.

In light of *Lemon*, supra, neither Bishop's comments nor his optional class runs afoul of the Establishment Clause. His conduct has a secular purpose. Education is secular when it encompasses exposure to "how" and "why" things are. His comments constitute a discussion of means and origins, a legitimate educational topic. Their primary effect does not advance or inhibit religion. They do not foster excessive government entanglement with religion. Accordingly, defendants' restrictions are unjustified. While the University has directed the court to four cases dealing with Establishment Clause issues wherein an employee of a governmental entity engaged in an activity without the approval of or against the instructions of his employer, none of the decisions was handed down by a court of last resort or by a United States Circuit Court of Appeals. Furthermore, plaintiff has not engaged in prohibited activities since notification by the University he was to cease.

While the defendants have prohibited the plaintiff from holding an optional after-class meeting, they have not prohibited other professors from organizing after-class activities on nonreligious subjects and have not prohibited a professor from conducting optional classes in which he discusses

nonreligious perspectives on academic topics. Dr. West[erfield] has stated that the prohibition does not even apply to other Christian groups. The Supreme Court has ruled that once a university has opened its facilities for use by student groups it cannot exclude other groups because of the content of their speech. *Widmar,* 454 U.S. at 273, 102 S.Ct. at 276. Any religious benefits stemming from an open forum are incidental. The open forum does not "confer any imprimatur of State approval on religious sects or practices." *Id.* at 274, 102 S.Ct. at 276. Nor does it "confer any imprimatur of State approval" on nonreligious groups who may, also, avail themselves of the open forum. This principle is applicable to the case at the bar.

Widmar further affirmed lower court holdings that no excessive entanglement existed from allowing extracurricular meetings on campus. The neutral policy itself avoided excessive entanglement. Enforcement of exclusions on religious speech would constitute a greater risk of entanglement. *Widmar,* 454 U.S. at 272 n. 11, 102 S.Ct. at 275 n. 11, 70 L.Ed.2d at 449 n. 11.

In *Roemer v. Department of Public Works,* 426 U.S. 736, 96 S.Ct. 2337, 49 L.Ed.2d 179 (1976), by following the *Lemon* criteria, the court held that the Establishment Clause was not violated by a Maryland statute authorizing public funding of private religiously oriented colleges. In an atmosphere where academic freedom is practiced, public funding of the college does not necessarily have the primary effect of advancing religion.

In light of *Widmar* and *Roemer,* Bishop's classroom comments and after-class meetings do not primarily advance religion. There is no evidence anyone believes his comments are anything other than his personal "bias" or that his religious views are in the least way sponsored by the state. Some comments are in response to student questions indirectly related to course work, such as research, tenure, promotion or publishing. They in no way present nearly so great an opportunity for influence or entanglement as do scheduled university courses on religion or theology, which are acceptable to the

University. *See Roemer*, supra. Nevertheless, while the University admits the teaching of these courses does not constitute an establishment of religion, it has issued a memorandum prohibiting professors teaching those courses from stating personal religious views.

Justice Steven's concurring opinion in *Widmar* rejected the Establishment Clause concern expressed by the University.

> [T]he University has not established a sufficient justification for its refusal to allow the Cornerstone group to engage in religious work on the campus. The primary reason advanced for the discriminatory treatment is the University's fear of violating the Establishment Clause. But since the record discloses no danger that the University will appear to sponsor any particular religion, and since student participation in the Cornerstone meetings is entirely voluntary, the Court properly concludes that the University's fear is groundless. With that justification put to one side, the University has not met the burden that is imposed on it by Healy.
>
> . . . . .
>
> It seems apparent that the policy under attack would allow groups of young philosophers to meet to discuss their skepticism that a Supreme Being exists, or a group of political scientists to meet to debate the accuracy of the view that religion is the "opium of the people." If school facilities may be used to discuss anticlerical doctrine, it seems to me that comparable use by a group desiring to express a belief in God must also be permitted.

454 U.S. at 280–81, 102 S.Ct. at 279–80, 70 L.Ed.2d at 454-55.

It would be clearly violative of the first amendment to allow presentation of one side of a debatable public question an advantage while suppressing the other. The University's directive is inconsistent. While it precludes discussion of academic subjects from a "Christian Perspective," it does not ban Jewish, Moslem, Hindu, Taoist, or other religious perspectives of course work.

The real issue in an Establishment Clause inquiry is the extent of state involvement. The government must be careful not to establish or condone any relationship with its citizens in which the government, by statute, or policy or practice, exerts influence over a person's religious beliefs. The court doubts that the plaintiff's minimal comments exert influence on the religious beliefs of college or graduate students. The court finds no merit to defendants' arguments that plaintiff's activities will lead to excessive government entanglement with religion. It further finds the University's comment that it would be forced to monitor plaintiff's speech and that of other faculty members "to make judgments about which statements are permissible and which statements are not permissible" a reflection of a seriously erroneous misunderstanding of the first amendment. Such monitoring would be an especially offensive violation of that amendment.

For the reasons set forth in this opinion the court holds the plaintiff has not violated the Establishment Clause of the Constitution. In so holding, it enjoins the University from restricting his first amendment rights. The University has no interest sufficient to justify restricting a professor's freedom to make occasional classroom comments about personal religious beliefs or to restrict him from holding after-class meetings with students on state university property to discuss a Christian perspective on academic topics. The plaintiff is entitled to summary judgment.

An order consistent with this opinion is being entered contemporaneously herewith. That order will contain a qualification of the allowance of the special class that the class be assured that a blind grading system is used.

FINAL ORDER GRANTING
SUMMARY JUDGEMENT

This cause comes before the court on cross motions for summary judgment. Having considered the motions, the pleadings, the submissions of counsel, and the applicable law,

the court is of the opinion that judgment is due the plaintiff as a matter of law, there being no genuine issue of material fact and there being no just reason for delay in entering a final judgment. Accordingly, in conformity with the memorandum opinion being entered contemporaneously herewith, it is

ORDERED, ADJUDGED and DECREED that the defendants' motion for summary judgment be and is hereby DENIED. It is

FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff's motion for summary judgment be and it hereby is GRANTED, and it is

FURTHER ORDERED, ADJUDGED and DECREED that defendants be and they hereby are ENJOINED from taking any action restricting plaintiff's first amendment rights of academic speech and religion. It is

FURTHER ORDERED, ADJUDGED and DECREED that the defendants be and they hereby are ENJOINED from restricting the plaintiff's classroom speech as long as it does not exceed the parameters of speech outlined in this opinion. It is

FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff be allowed to hold his special class in a University building only if permission is sought and only if he assures the class that a blind grading system is used. It is

FURTHER ORDERED, ADJUDGED and DECREED that the University may not unreasonably withhold permission for the plaintiff to hold his special classes in a University building. It is

FURTHER ORDERED, ADJUDGED and DECREED that if the plaintiff decides to hold his special class at some place other than a University building he must assure the class that a blind grading system is used. It is

FURTHER ORDERED, ADJUDGED and DECREED that FINAL JUDGMENT be and it hereby is ENTERED in favor of the plaintiff.

DONE and ORDERED.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7230

Filed May 16, 1991
by Miguel J. Cortez
Clerk

PHILLIP A. BISHOP,

Plaintiff-Appellee,

versus

AARON M. ARONOV;
WINTON M. BLOUNT;
FRANK H. BROMBERG, JR.,
et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: COX and BIRCH, Circuit Judges, and GIBSON*, Senior Circuit Judge

PER CURIAM:

(x) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on re-

* The Honorable Floyd R. Gibson, Senior U.S. Circuit Judge for the Eighth Circuit, sitting by designation.

hearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Emmett R. Cox
UNITED STATES CIRCUIT JUDGE

FILED
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No. 91-286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

PHILLIP A. BISHOP,
Petitioner,
v.
O.H. DELCHAMPS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the First Amendment allows a professor to express personal religious beliefs to students at a public university during class time.

2. Whether a public university, which has authority to regulate the academic speech of its faculty, can prohibit the expression of religious beliefs in order to protect students' rights and avoid an Establishment Clause violation.

PARTIES TO THE PROCEEDING

In addition to the party listed in the caption, the following persons are also parties: Hon. Guy Hunt, Dr. Wayne Teague, Mr. Yetta G. Samford, Jr., Mr. Frank H. Bromberg, Jr., Mr. Garry Neil Drummond, Mr. Jack Edwards, Mr. T. Michael Goodrich, Dr. Sandral Hullet, Mr. James D. Loftin, Sr., Mr. John T. Oliver, Jr., Mr. George S. Shirley, Mrs. Martha H. Simms, Mr. Cleophus Thomas, Jr., and Dr. Cordell Wynn. Aaron M. Aronov, Winton M. Blount, William H. Mitchell, and Thomas E. Rast, who were Defendants-Appellants in the court below, are no longer members of the Board of Trustees, and therefore are not parties in this Court. *See* SUP. CT. R. 35.3.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

A. The Facts 2

B. Proceedings Below 5

REASONS FOR DENIAL OF THE WRIT 7

I. THIS CASE IS ABOUT THE UNIVERSITY'S AUTHORITY TO CONTROL ITS CURRICULUM AND TO PREVENT A PROFESSOR FROM VIOLATING THE ESTABLISHMENT CLAUSE: IT DOES NOT POSE ANY THREAT TO ACADEMIC FREEDOM 8

A. This Case Is About A Professor's Actions In Violation Of The Establishment Clause.... 9

1. Bishop's In-Class Comments And His Extra Class Meeting Have No Secular Purpose 10

2. The Primary Effect Of Bishop's In-Class Comments And His Extra Class Meeting Is To Advance His Religious Philosophy 11

3. Bishop's In-Class Comments And Extra Class Meeting, If Allowed To Continue, Would Foster An Excessive Entanglement With Religion 12

4. The Real Issue In An Establishment Clause Inquiry Is The Extent Of State Involvement 12

B. Petitioner's Emphasis On Viewpoint Discrimination Ignores Students' Rights Under The Establishment Clause Of The First Amendment 13

TABLE OF CONTENTS—Continued

	Page
C. This Case Is Not About Jeopardizing A Professor's Academic Freedom	15
1. "Academic Freedom" In The Context Of A Professor's Personal Autonomy	17
2. "Academic Freedom" As Institutional Autonomy And As Judicial Restraint	19
D. When Have The Courts Become Involved In Internal Educational Decisions?	21
II. THE BALANCING APPROACH OF THE COURT OF APPEALS IS CORRECT	22
A. The Balancing Approach Is Applicable To All Other Public Employees	22
1. The Court May Act Only If The Employee's Actions Involve Matters Of Public Concern	22
2. Bishop's Actions Do Not Involve Matters Of Public Concern	24
3. Even If Bishop's Actions Involved Matters Of Public Concern, The University's Interests Are Overriding	24
B. The Nature Of Higher Education Is One Of A Continual Balancing Of Competing Interests	25
III. THE DECISION OF THE COURT OF APPEALS TO UPHOLD THE ACTION OF THE UNIVERSITY IS CORRECT	26
A. The Interests Of Students At The University Demand Upholding The Instructions Given To Petitioner	26
B. Adoption Of Petitioner's View Would Create A "Super" Free Speech Right For Professors	27
CONCLUSION	29

TABLE OF AUTHORITIES

CASES: Page

Bender v. Williamsport Area Sch. Dist., 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986) 15
Bishop v. Aronov, 732 F. Supp. 1562 (N.D. Ala. 1990) 5, 6, 12
Bishop v. Aronov, 926 F.2d 1066 (11th Cir. 1991) ..... *passim*
Bishop v. Wood, 426 U.S. 341 (1976) 20
Board of Educ. v. Pico, 457 U.S. 853 (1982) 18, 19, 22
Connick v. Myers, 461 U.S. 137 (1983) 23, 24
Epperson v. Arkansas, 393 U.S. 97 (1968) 12
Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986) 23
Gay Students Servs. v. Texas A&M Univ., 737 F.2d 1317 (5th Cir. 1984) 21
Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) 6
Keyishian v. Board of Regents, 385 U.S. 589 (1967) 18, 20, 21, 22
Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794 (5th Cir. 1989) 23
Lemon v. Kurtzman, 403 U.S. 602 (1971) 9, 10, 12, 13
Lundberg v. West Monoma Community Sch. Dist., 731 F. Supp. 331 (N.D. Iowa 1989) 14, 15
Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986) 18
Pickering v. Board of Educ., 391 U.S. 563 (1968) 21, 22, 23
Regents of the Univ. of California v. Bakke, 438 U.S. 265 (1978) 20, 22
Regents of Univ. of Michigan v. Ewing, 474 U.S. 214 (1985) 19, 20, 21
Sweezy v. New Hampshire, 354 U.S. 234 (1957) 18, 20, 21
Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969) 5, 21, 26
Wallace v. Jaffree, 472 U.S. 38 (1985) 11
Widmar v. Vincent, 454 U.S. 263 (1981) 6, 8
Wieman v. Updegraff, 344 U.S. 183 (1952) 18

CONSTITUTIONAL PROVISIONS AND STATUTES:

U.S. CONST. amend. I, establishment clause, free exercise clause, free speech clause ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

ALA. CONST. art. XIV, § 264 5
ALA. CODE §§ 16-47-1 to -2 (1987) 5

MISCELLANEOUS:

Council of the American Association of University Professors, *The Statement of Professional Ethics*, (1966) 28
Katheryn D. Katz, *The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth*, 16 U. C. Davis L. Rev. 857 (1983) 21
Mark G. Yudof, *Three Faces of Academic Freedom*, 32 Loy. L. Rev. 831 (1987) 16, 17, 18, 19

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Dr. Phillip Bishop [hereinafter "Bishop"] initiated this litigation to challenge the constitutionality of certain instructions given to him by administrators at the University of Alabama [hereinafter the "University"]. He had been told to discontinue interjecting personal religious beliefs into class lectures and to refrain from holding an extra class meeting to discuss his religious beliefs. Bishop believes that these prohibited actions are protected by the First Amendment, and that consequently, the University may not compel him to cease these activities.

The University maintains that Bishop has no constitutionally protected right to engage in these activities, that pursuant to its general responsibility to manage the institution it has the right to limit the topics that may

be discussed in university classes, and that it has an affirmative obligation to prevent conduct that violates the Establishment Clause of the First Amendment. The University also contends that the instructions given to Bishop are not so broad or vague that he cannot understand what activities are prohibited.

A. The Facts

Bishop is a member of the faculty at the University of Alabama, teaching in the Area of Health, Physical Education and Recreation within the College of Education. His specialty is exercise physiology. Dep. of Phillip A. Bishop (3/14/89) [hereinafter "Bishop Dep."] at 6-13.

Prior to the Fall Semester of 1987, Bishop had spoken about his personal religious beliefs to his students during instructional time. Complaint paras. 7-10 (R1-1-7 to 10). The classroom comments arose in two ways. First, in response to student questions about careers in higher education, Bishop explained that his Christian beliefs helped him to handle the pressures placed on untenured faculty members. Aff. of Phillip A. Bishop (7/11/89) [hereinafter "Bishop Aff."] at 2-3 (R2-40).

Second, in explaining the operation of the human body to his students, Bishop made references to God as creator. For example, after describing the intracacies of the operation of the oxygen delivery system to the muscles of the body and explaining how this delivery system changes as the body engages in exercise, he would make a comment such as, "so you can see God designed a very, very clever and efficient 0^2 [sic] transport system." *Id.* at 4.[1]

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[1] The district court completely ignored this second kind of statement and chose instead to find only that Bishop's in-class comments were prefaced as personal bias. Bishop engaged in this kind of "spontaneous" comment on a regular basis. *See*, Petition for Writ of Certiorari, *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (No. 91-286) [hereinafter "Pet."] at 3, 4. The Eleventh Circuit did not address the University's contention that the failure of the district court to recognize this kind of comment was a clearly erroneous finding of fact.

Bishop admits that "he is presenting only his views" when he is expressing his religious beliefs to his students, and he frankly admits that when he explains his understanding of the creative force behind human physiology, he is not offering his comments "in the context of presenting multiple opinions" and that his comments "are suggestive to his students that his views are correct. . . ." Pl.'s Admis. Nos. 1-2 (R1-28).

In March or April of 1987, Bishop conducted an extra class meeting in which he discussed the topic "Evidence of God in Human Physiology." Pl.'s Answers to Def. First Interrogs. [hereinafter "Int. Ans."] No. 11 (R1-29-No. 11). This class was characterized as "optional," but it contained technical material (which he described as "optional additional" and "enrichment" material) and was designed particularly for Bishop's graduate exercise physiology class. Bishop Dep. at 38-39. In identifying whom he invited to the extra class meeting, Bishop stated: "Essentially it was open to anyone who wanted to attend. I specifically asked people in the exercise physiology class because it's fairly technical material. People off the street wouldn't know what I was talking about. So it's an invitation to the exercise graduate class I was teaching." *Id.* at 39.

In his extra class, Bishop discussed various aspects of the human body, including the complexity of its design and operation. He offered this information as evidence that man was created by God and that evolution alone could not account for the phenomenon of man. Int. Ans. No. 12 (R1-29-No. 12). Included in his presentation were slides, two of which contained the statement "God's design is far superior to man's design," and a third, which stated "For God didst form my inward parts; God didst weave me in my mother's womb. I will give thanks to God for I am fearfully and wonderfully made. Psalm 139:13-14." Bishop Dep. at 36-38.

Near the end of the Spring 1987 semester, Dr. Carl Westerfield, Area Head (equivalent to Department Chairperson), received student complaints about Bishop's inter-

jection of his personal religious beliefs into class lectures and his holding of the extra class specifically to discuss religious matters. Significant to Westerfield was the fact that this extra class meeting was held before Bishop gave his final exam and assigned grades in the class. Dep. of Carl Westerfield (1/15/89) [hereinafter "Westerfield Dep."] at 15-16, 36-37.

Later that summer, when the department's faculty discussed recruitment of graduate students, Bishop suggested that the department could successfully recruit graduate students by advertising that the University offered a "Christian perspective" on the subject matter. Aff. of Carl Westerfield (8/14/89) (R2-45-2).

Due to the students' complaints and Bishop's recruitment suggestion, Dr. Westerfield consulted with appropriate University officials, and on September 16, 1987, issued a memorandum to Bishop containing the following instructions:

> Foremost, I want to reaffirm our commitment to your right of academic freedom and freedom of religious belief. This communication should not be construed as an attempt to interfere with or suppress your freedoms. From discourse with you and others, I feel that certain actions on your behalf are unwarranted at a public institution such as The University of Alabama and should cease. Among those actions that should be discontinued are: 1) the interjection of religious beliefs and/or preferences during instructional time periods and 2) the optional classes where a "Christian perspective" of an academic topic is delivered. I must also remind you that religious beliefs and/or the strength of a belief can not be utilized in the decisions concerning the recruitment, admission or retention of graduate students.

Pl.'s Ex. 4 to Westerfield Dep.

Contrary to the assertion of the petition, Westerfield's instruction to cease these activities was not motivated by embarrassment, but by a concern that Bishop's activities

were "unwarranted at a public institution," which is obligated to protect students' rights under the Establishment Clause.[2]

The University of Alabama has no specific policy that dictates how professors should conduct their classes, and it makes no attempt to require faculty members to limit every class comment to the subject matter only. The Board of Trustees of the University, however, has constitutional and statutory authority to manage the affairs of the University. *See* ALA. CONST. art. XIV, § 264, and ALA. CODE §§ 16-47-1 to -2 (1987). The University has endorsed the principles in the statement of professional ethics adopted by the American Association of University Professors. Pl.'s Ex. No. 8 to Westerfield Dep. (R2-45). That statement says, in part, that a faculty member "demonstrates respect for the student as an individual, and adheres to his proper role as intellectual guide and counselor." *Id.* at 123. In accordance with this statement, the University operates on the premise that its faculty members will conduct themselves according to highest principles of ethical standards and will refrain from using their positions as faculty members to advance their personal views, whether political, social, or religious.

B. Proceedings Below

On cross motions for summary judgment, the district court granted summary judgment for Bishop and enjoined the University from both restricting his classroom speech and prohibiting the optional class meetings, provided he used a blind grading system. *See Bishop v. Aronov*, 732 F. Supp. 1562 (N.D. Ala. 1990). The district court relied on *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), to reach its conclusion that Bishop had the right to express his personal

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[2] Petitioner's lawyers asked Westerfield, "Do you regard it as an embarrassment to the University that Dr. Bishop has views about religion that he thinks can be appropriately discussed in an academic context?" Dr. Westerfield's response was "No." Westerfield Dep. at 42.

views in the classroom as long as they were not disruptive. *Bishop*, 732 F. Supp. at 1565-66. The district court then misapplied the reasoning of *Widmar v. Vincent*, 454 U.S. 263 (1981), by determining that university classes are open forums and that the University violated Bishop's First Amendment rights by prohibiting his expression of religious beliefs in such a forum. The court also found that the written instructions given to Bishop were vague and overly broad. *Bishop*, 732 F. Supp. at 1565-66.

The Court of Appeals for the Eleventh Circuit reversed and ordered summary judgment for the University. *See Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991). That court essentially adopted the facts as determined by the district court,[3] but rejected the district court's application of *Widmar* by holding that "Dr. Bishop's classroom is not an open forum." *Bishop*, 926 F.2d at 1071. It also concluded that because the University's instructions proscribed specific conduct and adequately informed Bishop of the conduct it was addressing, they were not vague or overbroad. *Id.*

To determine the sufficiency of the University's interests in restricting Bishop's expression in the classroom, the court applied a balancing of interests test fashioned after this Court's analysis in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). While admitting that *Kuhlmeier* dealt with a secondary school, the court nonetheless determined that "insofar as [*Kuhlmeier*] covers the extent to which an institution may limit in-school expressions which suggest the school's approval, we adopt the Court's reasoning as suitable to our ends, even at the university level." *Bishop*, 926 F.2d at 1074. The key point in the balancing was the fact that Bishop expressed his religious comments in the classroom setting.

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[3] The Eleventh Circuit's handling of the facts is not precisely clear. It stated: "[W]e largely adopt the district court's statement of the facts, quoting freely therefrom and supplementing it as necessary." *Bishop*, 926 F.2d at 1068. The court did not address the University's contentions regarding clearly erroneous findings of fact by the district court.

> First and foremost, we consider the context: the university classroom during specific in-class time and the visage of the classroom as part of a university course in an after-class meeting. This context also leads us to consider the coercive effect upon students that a professor's speech inherently possesses and that the University may wish to avoid. The University's interest is most obvious when student complaints suggest apparent coercion—even when not intended by the professor.

Id.

Noting that "[f]ederal judges should not be ersatz deans or educators," and that the court "cannot supplant our discretion for that of the University," *id.* at 1075, the Eleventh Circuit determined that Bishop's expressions, including the so-called optional class meeting, were made in the context of classroom responsibilities and that the University's instructions were narrowly tailored and constituted a proper exercise of the University's right to control its curriculum. *Id.* at 1075-77. "In short, Dr. Bishop and the University disagree about a matter of content in the courses he teaches. The University must have the final say in such a dispute." *Id.* at 1076.

The court also determined that the University's instructions violated neither Petitioner's free exercise rights nor the Establishment Clause. The court did not reach the question of whether Bishop's expressions, themselves, violated the Establishment Clause, though it did suggest that his extra-class meeting was "particularly suspect." *Id.* at 1077-78.

REASONS FOR DENIAL OF THE WRIT

In an attempt to paint Respondents as an entity identified with denial of constitutionally protected rights, the lawyers for Bishop begin their petition by speculating that University officials, 30 years ago, would have sought to suppress statements advocating racial equality, just as they now seek to suppress Bishop's religious comments.[4]

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[4] Indeed, had they researched the topic, petitioner's counsel would have found the facts to be much different than they seek to por-

This emotional and irrelevant fabrication is nothing but an obtrusive attempt to divert the Court's attention from the real issues in the case.

Reduced to its essence, Petitioner's ultimate request to this Court is for it to legitimate clearly religious expressions in his classes under the guise of academic freedom. Petitioner seeks to portray the University's actions as a direct threat to academic freedom, while ignoring the effect of Bishop's conduct and the truly limited nature of the instructions given to him. His zeal to effect a fundamental change in the current status of the law prohibiting religious statements in the classroom has caused him to misconstrue the nature of academic freedom in higher education and the parameters of appropriate professional conduct. An accurate analysis of the law demonstrates that the Eleventh Circuit's opinion is correct and consistent with decisions of other courts of appeal as well as those of this Court. Consequently, this Court should deny the Petition for Writ of Certiorari.

I. THIS CASE IS ABOUT THE UNIVERSITY'S AUTHORITY TO CONTROL ITS CURRICULUM AND TO PREVENT A PROFESSOR FROM VIOLATING THE ESTABLISHMENT CLAUSE: IT DOES NOT POSE ANY THREAT TO ACADEMIC FREEDOM.

In creating a favorable structure for the issues before this Court, Bishop now describes this case as a national threat to academic freedom. Strangely, no threat to academic freedom was argued in the district court or in the Eleventh Circuit.[5] In both courts below, Petitioner's focus was on applying *Widmar* in a way never intended by this Court. Bishop asks this Court to characterize all univer-

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tray. University officials, as opposed to other forces in the state at that time, eagerly cooperated with Justice Department officials to facilitate the admission of Blacks at the University of Alabama.

[5] It is true that count one of the complaint is labeled "Academic Freedom." However, this topic was not specifically argued in either court below. Petitioner's contention below has always been that he had general First Amendment protection for his expressions.

sity classes as open forums and to establish an absolute right for faculty members to speak therein about whatever they wish.

The facts show, however, that this is not an open forum case, it does not pose a national threat to academic freedom, and it does not present a purely academic dispute between employer and employee over how to present material that everyone agrees is properly included in the course. It is, instead, about one university professor's class-time expressions of religious views that are wholly unrelated to his assigned subject,[6] and that were presented in a manner that his students and his supervisors found coercive and objectionable. It is about the right of the University to exercise its management authority appropriately to prevent Establishment Clause violations affecting the rights of its students.

A. This Case Is About A Professor's Actions In Violation Of The Establishment Clause.

To deemphasize his Establishment Clause violation, Petitioner seeks to portray his religious expressions as minimal, making reference to the limited time consumed in class. He describes his extra class meeting as an extracurricular event not really associated with his classes. His characterizations, however, do not change the fact that both his in-class expressions and his optional class arose in the course of his assigned duties.

For a religious activity to avoid an Establishment Clause violation, the activity must meet all three criteria announced by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).[7] "First, the [action] must have a secu-

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[6] The fact that those beliefs may be derived or inferred from the conclusions Bishop draws from his study of the assigned subject matter does not make the expression of religious belief material to a discussion of the operation of the body.

[7] A public employee's engaging in speech that directly conveys a peculiarly religious message during the performance of his assigned duties must, by definition, implicate the Establishment Clause.

lar legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the [action] must not foster 'an excessive government entanglement with religion.' " *Id.* at 612-613.

1. *Bishop's In-Class Comments And His Extra Class Meeting Have No Secular Purpose.*

The plainly stated purpose of Bishop's activities is to share his religious beliefs with others. "I have a personal religious belief that I should share my views about Jesus with others when the appropriate circumstances arise." Bishop Aff. at 3 (R2-40). Bishop argues that his actions are justified as part of an open exchange of ideas in keeping with the purpose of a university and that his actions are consistent with and in furtherance of academic debate. However, the disputed activities did not occur in an atmosphere of a free exchange of ideas, but involved a statement of personal belief conveyed as unquestionable truth.

The first type of Bishop's in-class comments, and the one emphasized in his petition, describes his approach to life and/or his personal bias, in response to questions.[8] The second kind of comment refers to God as the designer of the human body's complexities. Even though seemingly benign, and even though those references to God occurred only one or twice a month, they were made for the unmistakable purpose, and had the effect of, conveying a message of religious truth—precisely the kind of activity the Establishment Clause prohibits. Petitioner has freely admitted that he believes that he must share his beliefs

[8] While a professor certainly has a right to, and should, answer questions during class, good judgment should be used to avoid taking advantage of the situation for one's own purposes. A more appropriate response would have been "Personally, my religious beliefs help me in times of stress. I don't believe we should discuss that in class, but I will be happy to talk with you about it privately." Such a response would have avoided an Establishment Clause problem and would have preserved the opportunity for Bishop to share his beliefs privately with any student who was interested.

with others and these comments were designed to do just that. *See* Bishop Aff. at 3.

The extra class meeting, which had no secular purpose, also violated the Establishment Clause. There can be no question that the content of this "class" was intended to convey, and had the effect of conveying, a distinctly religious message. Bishop implicated the authority of the public university by the manner in which he announced and held the optional class, which was connected to the course he was teaching for the University. The violation was in the fact that the religious messages were directly connected to the classes assigned to Bishop. As the Eleventh Circuit pointed out, he could properly have called a meeting to discuss any subject he wished, as long as it was not tied to the courses he teaches.[9] But in this case it was so tied.

2. *The Primary Effect Of Bishop's In-Class Comments And His Extra Class Meeting Is To Advance His Religious Philosophy.*

The plain and simple effect of Bishop's classroom comments and his extra class meeting is to communicate the content of his personal religious beliefs to his students and to suggest that his views are correct. There is no difference in the message communicated by Bishop and that communicated by prayers in public schools, which have uniformly been found to be in violation of the Establishment Clause. *See, e.g., Wallace v. Jaffree*, 472 U.S. 38 (1985).

The manner in which he made his comments, the where and when, leaves an impression that his activities were backed by the authority of the state, a fact which necessarily leads to the conclusion that the University's con-

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[9] Petitioner argues that the court of appeals had to contort this aspect of the instructions given in order to validate them. Pet. at 15. In fact, the Eleventh Circuit plainly explained that the University's instructions left Bishop free to schedule a "meeting" to discuss this subject as long as it was not connected to the "classes" he was assigned to teach. *Bishop*, 926 F.2d at 1076.

donation of these activities would be a violation of the Establishment Clause.

3. *Bishop's In-Class Comments And Extra Class Meeting, If Allowed To Continue, Would Foster An Excessive Entanglement With Religion.*

To allow Bishop to continue his actions would result in "an excessive government entanglement with religion." *Lemon*, 403 U.S. at 613. This third part of the test focuses on the relationship that would result between religion and the University if the activity continued. *Id.* at 615. The University would be forced, on an on-going basis, to monitor Bishop's comments, as well as those of all other faculty members who may choose to make comments about personal religious beliefs, to determine whether any unconstitutional statements were being made. Although the district court found no excessive entanglement in the existing situation, it did acknowledge: "Such monitoring would be an especially offensive violation. . . ." *Bishop*, 732 F. Supp. at 1568.

4. *The Real Issue In An Establishment Clause Inquiry Is The Extent Of State Involvement.*

The basic principle embodied in the religion clauses of the First Amendment is that the government must be *neutral* toward the religious beliefs of its citizens. As this Court has explained,

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

Epperson v. Arkansas, 393 U.S. 97, 103-104 (1968).

Therefore, each citizen is free to choose what to believe or what not to believe concerning religious matters.

The government, however, may not attempt to influence what a citizen should believe or what a citizen should not believe (an "establishment of religion"). In order to ensure that this does not happen, the government must be careful not to establish or condone any relationship with its citizens in which the government, by statute, policy or practice, exerts influence over a citizen's religious beliefs.

In the facts of this case, Bishop, an employee of the state, is in a position of influence over his students, so that his comments in class may well affect his students' beliefs about religion. Indeed, *that is exactly what he hopes will happen!* This same direction is clear in his desire to advertise a "Christian" perspective in student recruitment. This is precisely what the religion clauses of the First Amendment were designed to prohibit.[10]

Each of Bishop's activities, his in-class comments and his extra class meeting, violate all three parts of the *Lemon* test and constitute a violation of the Establishment Clause. If the University had not taken action to prevent further in-class comments and additional extra class meetings, students who were offended could have easily accused the University of violating their rights under the Establishment Clause.

Therefore, even though not addressed by the court of appeals, the Establishment Clause violation provides good reason not to disturb the decision of that court.

B. Petitioner's Emphasis On Viewpoint Discrimination Ignores Students' Rights Under The Establishment Clause Of The First Amendment.

The second portion of the petition asserts that Bishop's activities are merely an expression of a "viewpoint," and therefore they are no different from other expressions of

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[10] Even though Bishop insists that attendance at the extra class meeting is purely voluntary, his position as instructor and the timing of the meeting before final exams is presumptively coercive. Bishop acknowledged that the timing of his extra class had a subtle coercive effect on his students' attendance when he admitted in his deposition that "[n]ot too many people come to those classes after the final exam. . . ." Bishop Dep. at 40.

viewpoints by other professors, protected by the First Amendment. He argues: "That petitioner's intellectual perspective happens to be religious does not remove his speech from the protections of the First Amendment. Content-based regulation of speech is no more legitimate when the speech is religious than when the speech is secular." Pet. at 24-25.

This statement is inherently false in the context of this case. Bishop's speech is more than just an "intellectual perspective" on his subject. It is explicitly designed and intended to convey a message of religious truth. The very language of the First Amendment[11] creates a special category for such expressions, and imposes a duty on the state not to engage in any expression of opinion on this subject.

Even assuming, *arguendo*, that Bishop has some First Amendment right at stake, the issue then becomes how to reconcile a direct conflict between rights and duties arising from the First Amendment. The task before the court is to balance one interest, such as free speech, free press, or free exercise, against the competing interest, such as a duty to prevent an Establishment Clause violation. In this case, the interest in preventing Bishop from violating the Establishment Clause and disregarding the rights of his students must outweigh Bishop's own claimed free speech rights. *See Lundberg v. West Monoma Community Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989).[12] The old adage that "my free-

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[11] "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

[12] In *Lundberg*, school board officials, who personally supported prayer at a high school graduation ceremony, nonetheless refused to allow prayer at the ceremony because they were advised that this activity would probably violate the Establishment Clause of the First Amendment. Four students filed suit claiming their free speech rights had been violated. Faced with conflicting interpretations under the separate clauses of the First Amendment, the court applied the balancing test used by the Third Circuit to resolve this constitutional conflict:

[Continued]

dom ends where another person's freedom begins" applies here, especially when the balance to be struck pits the questionable right of a single professor to proclaim his religious beliefs against the uncontroverted rights of large numbers of students, who are under his tutelage, to be free from government interference with their own religious beliefs.[13]

C. This Case Is Not About Jeopardizing A Professor's Academic Freedom.

Bishop's petition describes in detail his efforts to have the University's instructions rescinded. Pet. at 6, 7.

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[12] [Continued]

> In those cases in which there is a true and uncontrived conflict between the free speech clause on the one hand, and the establishment clause on the other, we believe that the appropriate analysis requires weighing the competing interests protected by each constitutional provision, given the specific facts of the case, in order to determine under what circumstances the net benefit which accrues to one of these interests outweighs the net harm done to the other. Recognizing that, under these circumstances, some constitutional protections must unavoidably be abridged, we believe that our role is to maximize, as best as possible, the overall measure of the fundamental rights created by the framers, by deciding which course of action will lead to the lesser deprivation of those rights.

Lundberg, 731 F. Supp. at 347 (quoting *Bender v. Williamsport Area Sch. Dist.*, 741 F.2d 538, 559 (3d Cir. 1984), *vacated on other grounds*, 475 U.S. 534 (1986)). The district court found that the school board's interest in preventing the establishment of religion outweighed the students' purported interests in exercising their free speech rights. In its analysis, the court considered the potentially greater effect a violation of the Establishment Clause carried, since it affected all the graduating seniors, not just the four complaining students who wished, but would not be able, to hear the prayer. *Lundberg*, 731 F. Supp. at 347.

[13] Without using the precise terms of this old adage, the court in *Lundberg* appropriately applied its meaning in addressing countervailing claims of the Free Exercise Clause versus Establishment Clause. "When the court addresses free exercise-of-religion claims, the court must always remain wary lest its accommodation for some consummates an establishment for many." *Lundberg*, 731 F. Supp. at 339-40.

What is significant is the absence of any indication of discussions between Bishop and University officials about academic freedom as such. In Bishop's discussions and correspondence with his Area Head, his Dean, and the President of the University, he simply maintained that he had the right to express his religious views during class time. He did not argue that he had the right to interject his religious beliefs because they were related to his subject matter. He admitted in the record below that he made those comments "not in the context of presenting multiple opinions," Pl.'s Admis. No. 2 (R1-28-No. 2), but in furtherance of his personal conviction that he "should share [his] view about Jesus with others when the appropriate circumstances arise." Bishop Aff. at 3 (R2-40). This does not constitute, and never has constituted, a debate between academicians over the educational value of a legitimate portion of course content. This is simply an attempt to convey personal religious beliefs to students during class time.

Bishop acknowledges correctly that this Court has "embraced the tradition of academic freedom" that has long been essential to the operation of American research universities, Pet. at 14, that "academic freedom remains a 'special concern of the First Amendment,'" and that the "essentiality of freedom in the community of American universities is almost self-evident." Pet. at 10. His conclusions about academic freedom are, however, based on the erroneous premise that such academic freedom belongs exclusively to the instructor and not to the institution, which is charged with the mission of exposing students to the marketplace of ideas.

The term "academic freedom" has many aspects. The cases referring to this freedom can be reconciled only by recognizing that the interpretation of the term varies with the context of each case. Mark G. Yudof, in his article entitled *Three Faces of Academic Freedom*, 32 Loy. L. Rev. 831 (1987) [hereinafter "Yudof"], identifies three separate meanings for the term.

1. *"Academic Freedom" In The Context Of A Professor's Personal Autonomy.*

The first meaning relates to a professor's personal autonomy in performing his duties in the university setting. Yudof concedes that the only support he finds for any personal First Amendment right of academic freedom is the general argument that what is good for the professor is good for education. *Id.* at 837-41.

> In my judgment, a persuasive constitutional argument for academic freedom as professorial autonomy has yet to emerge from the cases and scholarly works. The core difficulty is that *it is one thing for government to censor the private speech of individuals in the world at large, and quite another thing for public and private educational institutions to control the speech of those whom they pay to speak for them. . . .* In a sense, the University accomplishes its legitimate mission by hiring the profesor to speak for it, and without the ability to control his speech, the whole enterprise comes to nothing.
>
> * * * *
>
> Unless an abridgement of speech lies in every exercise of governmental authority to speak through individuals—and how else might abstract entities called governments speak?—it is difficult to countenance the view that government control of its own professional speakers violates the historically developed concepts of freedom of expression.
>
> * * * *
>
> The fundamental principle is that the public university can control what is spoken in the classroom, and the line-drawing does not seem rooted in a cognizable right of the professor.

Id. at 838-39 (emphasis added).

Yudof sees personal autonomy in scholarly endeavors of research and publication, rather than in teaching. *Id.* at 837-41. He explains that "most defenses of academic freedom as a right are historically rooted in the freedom to conduct and publish research, to advance knowledge and

truth." *Id.* at 841. *See Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957); and *Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring). Indeed, the personal autonomy that a professor has in conducting research is, in reality, greater than he or she has as a teacher, because there are fewer properly motivated educational reasons that would justify constraints on a professor's research. When the professor steps into the classroom, however, other interests come into play. Students pay money to the university to receive instruction on a particular subject, and instructional time is limited. If a professor had a special First Amendment right to spend class time discussing at his whim such things as his religious beliefs, students would have a legitimate complaint that they were not receiving instruction for which they had paid.[14]

These other interests are not present when the professor is engaged in research, and, therefore, his research activities are not as much subject to supervision.[15]

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[14] Indeed, the Fifth Circuit has recognized that the interests of a college student include the payment of money for a particular course and that this interest is properly included when balancing the competing interests involved when a professor claims First Amendment protection for his in-class comments after the administration has instructed him to cease his comments. *See Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986).

[15] This Court's opinion in *Board of Educ. v. Pico*, 457 U.S. 853 (1982), endorsed the principle that administrators have substantially more control over the classroom, because of their duty to control the curriculum, than they do over other facets of the school's operation. *Pico* involved the removal of books from a school library because administrators personally believed that the books were "anti-American, anti-Christian, anti-semitic, and just plain filthy." *Id.* at 857. In deciding against the administrators, this Court focused on the distinction between control over books in a library versus those required in the classroom.

> Petitioners might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values. But we think that petitioners' reliance

None of the cases cited by petitioner squarely hold that a professor, in the context of a university class, has the right to interject comments about personal beliefs unrelated to the subject matter, over the well-founded objection of administrators. There are cases that contain rhetoric about academic freedom, but as Yudof correctly observes, constitutional protection is not afforded to the unfettered discretion of a professor to express himself freely in the classroom.

2. *"Academic Freedom" As Institutional Autonomy And As Judicial Restraint.*

The second and third meanings of "academic freedom" cited by Yudof relate to the university's autonomy, which enables the university to fulfill its mission of creating an atmosphere where ideas are fully exchanged, and to the judicial policy of restraint, which is premised on the courts' recognition that it is in the best interest of education to allow administrators, rather than courts, to manage educational institutions. *See* Yudof, *supra*, at 848-54.

These twin concepts of academic freedom may be viewed as two sides of the same coin. The key point is that the judiciary recognizes that education is better served if those in the business of educating make the decisions necessary to achieve their mission. Therefore, judicial restraint is necessary to ensure institutional autonomy, and consequently the meaning of academic freedom is strengthened as it relates to the university administration.

That some form of "academic freedom" belongs to the institution itself is evident from numerous opinions of this Court. For example, Justice Stevens, writing for a unanimous Court in *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214 (1985), reaffirmed this Court's "re-

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upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom into the school library and the regime of voluntary inquiry that there holds sway.

Id. at 869 (emphasis in original).

luctance to trench on the prerogatives of state and local educational institutions and [the court's] responsibility to safeguard [the institution's] academic freedom, 'a special concern of the First Amendment.'" *Id.* at 226 (quoting from *Keyishian v. Board of Regents*, 385 U.S. at 603). The concept of academic freedom is defined as one that "thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . ., but also, and somewhat inconsistently, *on autonomous decisionmaking by the academy itself. . . .*" *Ewing*, 474 U.S. at 226 n.12 (citations omitted & emphasis added). This Court has recognized its responsibility to safeguard the First Amendment's "four essential freedoms" of a university: "[T]o determine for itself on academic grounds who may teach, *what may be taught, how it shall be taught*, and who may be admitted to study." *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (emphasis added).[16] Bishop would have this Court hold that once a university exercises the first freedom—to determine "who may teach"—it gives up the second two freedoms—to determine "what may be taught" and "how it shall be taught."

The Court recognizes that the judiciary is not particularly well-equipped to review the substance of a "genuine academic decision." As this Court recognized in *Ewing*,

> [i]f a "federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," *Bishop v. Wood*, 426 U.S. 341, 349, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976), far less is it suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require "an expert evaluation of cumulative information and

[16] This Court has endorsed Frankfurter's articulation of the First Amendment's four freedoms of an institution in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 312 (1978), and in *Ewing*, 474 U.S. at 226 n.12.

> [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking."

Id. at 226. Because of the courts' respect for the institution's professional judgment, a court will not substitute its own judgment in reviewing academic decisions unless the educational decision being reviewed departs so substantially from accepted academic norms that it is evident that professional judgment was not exercised. *Id.*

D. When Have The Courts Become Involved In Internal Educational Decisions?

If there is no absolute First Amendment protection for the personal autonomy of the professor and if there is a strong policy of deference to internal decisionmaking in academic institutions, when have the courts become involved in reviewing those internal decisions? Katheryn D. Katz, in her article, *The First Amendment's Protection of Expressive Activity in the University Classroom: A Constitutional Myth*, 16 U. C. Davis L. Rev. 857 (1983), argues that, despite the rhetoric about academic freedom flowing from cases such as *Keyishian*, *Tinker*, and *Sweezy*, the impression that academic freedom for professors is a grand aspect of the First Amendment is not really supported by the holdings in those cases. Rather, the courts have applied general First Amendment principles, and not special considerations, to professors in the university setting.

First Amendment cases arising in school settings can be divided into three categories. First are the cases protecting students' and teachers' participation in the political process, as long as the classroom is not disrupted.[17] Second are the cases focusing on the protection of an individual's freedom of association.[18] The third category

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[17] *See, e.g., Tinker*, 393 U.S. 503; *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

[18] *See, e.g., Keyishian*, 385 U.S. 589; *Sweezy*, 354 U.S. 234; *Gay Students Servs. v. Texas A&M Univ.*, 737 F.2d 1317 (5th Cir. 1984).

of cases involves various factual scenarios in which the courts, in determining whether the academic freedom of the institution should prevail, focused primarily on the motivation underlying the administrative action.[19]

Thus, the cases attach no special "magic" to the academic setting when an issue involving First Amendment rights of faculty arises. Courts look at the rights and interests involved, assess the motives and goals underlying administrators' decisions, and apply basic constitutional analyses in rendering their decisions.

II. THE BALANCING APPROACH OF THE COURT OF APPEALS IS CORRECT.

In upholding the University's instructions to Bishop and ordering summary judgment in its favor, the Eleventh Circuit used a balancing approach that examined: (1) the context in which the expressive activity occurred; (2) the unique employer-employee relationship present in an educational setting; and (3) any free speech rights of professors in the classroom. That approach is correct because it uses the same balancing approach that this Court has applied to all other public employees and is consistent with the nature of higher education.

A. The Balancing Approach Is Applicable To All Other Public Employees.

1. *The Court May Act Only If The Employee's Actions Involve Matters Of Public Concern.*

This Court articulated the following standard for reviewing cases involving the First Amendment rights of public employees:

> "[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected." [citing *Keyishian v. Board of Regents*] At the same time it cannot be gainsaid that the state has interests as an employer in regulating the speech of

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[19] *See, e.g., Pico*, 457 U.S. 853; *Bakke*, 438 U.S. 265.

> its employees that differs significantly from those it possesses in connection with regulation of the speech of the citizenry in general. *The problem in any case is to arrive at a balance between the interests of the teacher*, in commenting upon matters of public concern *and the interests of the state*, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering v. Board of Educ., 391 U.S. at 568 (emphasis added).

This Court reiterated *Pickering's* balancing standard and further explained the extent of the courts' involvement in such cases in *Connick v. Myers*, 461 U.S. 137 (1983). If the employee's speech does not concern a public matter, judicial intervention is unwarranted. "[W]hen a public employee speaks . . . upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Id.* at 147.[20]

Pursuant to *Pickering* and *Connick*, therefore, the first step in any court's review of Bishop's activities must be to determine whether they address a matter of public

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[20] A recent decision by the Fifth Circuit states this proposition very clearly:

> If the nature of the speech is purely private, such as a dispute over one employee's job performance, a non-tenured school teacher enjoys no First Amendment protection as to that speech. *Connick*, 461 U.S. at 146, 103 S.Ct. at 1690. Judicial inquiry then comes to an end, and the question of whether the employee's speech was a substantial or motivating factor in the decision not to rehire him need not even be reached. [citing *Ferrara v. Mills*, 781 F.2d 1508 (11th Cir. 1986)] [footnotes omitted]

Kirkland v. Northside Indep. Sch. Dist., 890 F.2d 794, 799 (5th Cir. 1989).

concern. If not, the University must be granted wide latitude in dealing with its employee.

2. *Bishop's Actions Do Not Involve Matters Of Public Concern.*

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-148.[21] An examination of all the facts in this case clearly shows that Bishop's activities do not address a matter of public concern, but deal only with a matter of intense personal interest to Bishop. His in-class statements and his extra class meeting were devoted to conveying his personal religious beliefs to his students. In no way can this be construed as a matter of public concern. Consequently, there is no need to apply any further balancing to the facts presented.

3. *Even If Bishop's Actions Involved Matters Of Public Concern, The University's Interests Are Overriding.*

Even if the activities of Bishop did involve matters of public concern, his interests would have to be balanced against the interests of the University. Bishop's interest here relates only to his personal right to communicate his religious beliefs.[22] The University's interests are much stronger. The University has the responsibility to formulate and administer its curriculum. It has a strong interest in ensuring that faculty members adhere to that curriculum and that they not change the content of courses

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[21] In a footnote to that statement, this Court makes it clear that "[T]he inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n.7.

[22] As the Eleventh Circuit held, Bishop has never seriously argued that he has the right to engage in these activities under the Free Exercise Clause of the First Amendment. *Bishop*, 926 F.2d at 1077.

in ways deemed unwise or unwarranted by appropriate University officials. Also, the University has a legitimate interest in seeing to it that faculty members respect students' rights and refrain from exploiting their positions by imposing personal religious views on their students.

In light of the strong concerns of the University, which are reasonable in light of its constitutional and statutory duties, any balancing should conclude that the University's interests outweigh those of Bishop.

B. The Nature Of Higher Education Is One Of A Continual Balancing Of Competing Interests.

Decisionmaking in higher education involves a continual process of balancing competing, sometimes overlapping, interests to provide quality education for student consumers. Such interests include those of students, of faculty, and of administrators.

While the administrators must ensure that the institution offers a curriculum that is responsive to the desires of its students, meets the needs of the state supporting it, and offers quality programs acceptable in the community of higher education, they must balance all factors, including the interests of professors *and* students, in such a way as to achieve an adequate accommodation to each interest without causing serious detriment to some other interest.

The expression of personal opinions by any member of the faculty is certainly desirable in discussions about academic decisions, but one individual opinion cannot be allowed to outweigh the collective judgment of the university community. This is true even if the individual faculty member believes that his judgment as to the content of his class presentations is protected within the scope of his "academic freedom." To allow such individual overriding of collective judgments about curricular content would be to create academic anarchy.

III. THE DECISION OF THE COURT OF APPEALS TO UPHOLD THE ACTION OF THE UNIVERSITY IS CORRECT.

Petitioner's effort to have this Court perceive an infringement on academic freedom, necessitating judicial action to protect the interests of academicians everywhere, should fail. The result achieved by the Eleventh Circuit is correct because it protects students and their religious freedom in the classroom.

A. The Interests Of Students At The University Demand Upholding The Instructions Given To Petitioner.

By portraying an overbearing administration censoring his speech, Petitioner would have this Court believe that his rights are the only ones at stake. As evidenced by the complaints made, Bishop totally ignored the First Amendment rights of students in his classes, despite *Tinker*'s clear statement that students retain such rights in the classroom. *Tinker*, 393 U.S. at 506. By taking this view, Bishop refuses to recognize that, in reality, the University's action was taken to protect, rather than to restrict, rights.

To clarify the picture, Respondents suggest that it would be valuable to analyze the facts in this case from a different perspective. Assume that the University had done nothing in response to the students' complaints about Bishop's activities. Now assume that a student had sued the University, alleging that her rights had been infringed and that Bishop's activities violated the Establishment Clause. The constitutional issues would remain the same, but the student interest would be more apparent.

The protection of that interest is precisely the effect of the court of appeals' decision. Without clearly stating such, the Eleventh Circuit decided that the University could protect the interests of its students as it deemed

necessary. The result of the decision is that students are not forced to listen to Bishop's religious beliefs and are not faced with the coercive choice of whether or not to attend an extra class meeting that addresses a purely religious topic.

The memo given to Bishop was simply a reminder to separate his professional and personal activities. It was not a disciplinary action.[23] It attempted to balance his rights against those of his students and the University. It made no attempt whatsoever to address his private activities, and the court of appeals so held:

> We conclude that the University's restrictions as expressed in its memo are sufficiently narrow and clear to put Dr. Bishop on notice of what he cannot do and do not reach otherwise protected speech. We are confident that, as a professional, Dr. Bishop knows that the University asks only that he separate his personal and professional beliefs and that he not impart the former to his students during "instructional time" or under the guise of the courses he teaches in so-called optional classes.

Bishop, 926 F.2d at 1071.

B. Adoption Of Petitioner's View Would Create A "Super" Free Speech Right For Professors.

Some consideration must be given to the consequences of adopting Petitioner's view of academic freedom. From his petition, it appears that Bishop believes that a university instructor should be totally free to speak about whatever subject he or she chooses during class time and to schedule extra class meetings on any topic, with only two minor caveats. First of all, the teacher would, arguably, have to cover the subject matter of the courses assigned. Second, he or she would have to avoid "disruption" in the classroom. According to Petitioner's view, if the instruc-

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[23] Indeed, Bishop has not been disciplined in any way and was, in fact, granted tenure during the course of this case.

tor did these two things, the administration *could not* interfere with his or her conduct in class.

This would create an intolerable situation on college campuses. Professors who were so minded could impose any number of personal views on their students for a significant amount of time in every class. They could then go through the assigned material in the remaining time and, if efficient in their teaching, arguably could say that they had done their job by covering the material. Under Petitioner's view, the administration could not act to preclude those daily harangues. Similarly, if a professor avoided inflaming his or her students to the point that classes were disrupted, whether by diplomacy or intimidation, the administration could not act. Students would then be nothing more than captive audiences subject to daily doses of the pet peeves and personal beliefs of faculty members.

Respondents realize that even if faculty members were given *carte blanche*, not all would react in this way; large numbers would continue to adhere to their professional standards.[24] It is foreseeable, however, that some unknown number would not hesitate to take advantage of their students. Surely, this is not the kind of scenario that can be tolerated under the guise of "academic freedom" for the professor. No other public employees, and

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[24] *The Statement of Professional Ethics*, adopted by the Council of the American Association of University Professors in April, 1966, reads in part:

> As a teacher, the professor encourages the free pursuit of learning in his students. He holds before them the best scholarly standards of his discipline. He demonstrates respect for the students as an individual, and adheres to his proper role as intellectual guide and counselor. He makes every reasonable effort to foster honest academic conduct and to assure that his evaluation of students reflects their true merit. He respects the confidential nature of the relationship between professor and student. He avoids any exploitation of students for his private advantage and acknowledges significant assistance from them. He protects their academic freedom.

indeed no other citizens, enjoy such protection for their expressions. Protecting the "marketplace of ideas" was never intended to place that kind of burden on the administrators or consumers of higher education.

CONCLUSION

Based on the foregoing, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1991

PHILLIP A. BISHOP,

Petitioner

v.

O. H. DELCHAMPS, JR., ET AL.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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13

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: *Page*

Cohen v. California, 403 U.S. 15 (1971) 3

Connick v. Myers, 461 U.S. 137 (1983) 7

Lee v. Weisman, No. 90-1014 4

Martin v. City of Struthers, 319 U.S. 141 (1943) 3

Tinker v. Des Moines Independent Community School District, 399 U.S. 503 (1969) 6

Widmar v. Vincent, 454 U.S. 263 (1981) 2

Miscellaneous:

Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NwU L. Rev. 1 (1986) 3

REPLY BRIEF FOR PETITIONER

Respondents have many interesting — even radical — things to say in defense of their power to censor unwelcome viewpoints in the classroom and in out-of-class meetings between professors and students. Respondents dismiss this Court's statements about academic freedom as "rhetoric" (Brief in Opposition ("Br. in Opp.") 19, 21) and embrace, unflinchingly, even the most extreme propositions put forward by the decision below. This is not the occasion to determine whether any of respondents' arguments are right. But the Brief in Opposition only confirms that this is a case of grave importance for the free speech rights of professors at public universities. If respondents' arguments *are* right, then university administrators have not only the power but the duty to "protect" the students from "inappropriate" viewpoints — and academic freedom in the classroom is stripped of legal protection. The Brief in Opposition thus stands as an argument in favor of granting the Petition.

1. It is startling to read (Br. in Opp. 5) that "the University operates on the premise that its faculty members . . . will refrain from using their positions as faculty members to advance their personal views, whether political, social, or religious." This may be true in Albania, but it cannot possibly be true in Alabama. In fact, professors at the University of Alabama are free (as they are at other American universities) to "divulge personal views in the classroom as long as they are not disruptive of classroom activities." Pet. App. A31. This case is about discrimination against a particular opinion or viewpoint — Professor Bishop's religious viewpoint. As the record shows (and respondents do not deny), Professor Bishop's "occasional comments" in class do not differ from the expressions of other faculty members on political, social, or other subjects in any respect but one: his viewpoint is religious. Respondents are driven, therefore, to defend one of two heroic positions — either there is no academic freedom for the expression of personal and professional opinion in the classroom, or the

University is permitted to discriminate against one particular point of view.

2. Respondents' defense of viewpoint discrimination is based on a supposed obligation under the Establishment Clause to ensure that no religious comments — even "occasional" ones — reach the ears of students in the classroom. If this argument is true, the universities in America have a mighty task of censorship in front of them, which few (if any) have recognized.

The Establishment Clause limits the power of the government, not the speech of the citizens. Respondents' Establishment Clause argument (Br. in Opp. 9-13) is based on the presupposition that Professor Bishop is the government for purposes of the First Amendment — that his speech is the speech of the State. They analyze *his* purpose, and say that it is not secular (*id.* at 10-11). They analyze the effect of *his* statements, and say that they advance religion (*id.* at 11-12). Our position, by contrast, is that university professors are *not* mouthpieces for the State. They are independent professionals with academic freedom rights recognized under both the regulations of the University and the Free Speech Clause of the First Amendment. The correct question under the Establishment Clause, therefore, is whether the *University* has a secular purpose, and whether the effect of the *University's* actions is to advance religion. Cf. *Widmar v. Vincent*, 454 U.S. 263, 271-75 (1981) (focusing Establishment Clause analysis on the University's purposes and actions, not on those of individual student speakers). As the district court held (Pet. App. A36), this is not a close or difficult question. The University's purpose in allowing its professors to teach without interference or censorship is to promote free exchange and scholarship. The effect of this policy is to bring a diversity of views to the attention of its students, without favoring religion over nonreligion, or nonreligion over religion.[1]

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[1]On the entanglement issue, the "University would be forced, on an ongoing basis, to monitor Bishop's comments" (Br. in Opp. 12) only if the

Respondents make a colorable Establishment Clause argument only by assuming that what is said in the classroom is attributable to the State. See Br. in Opp. 12-13. This assumes there is no right of academic freedom in the classroom, for if the various professors in the various classrooms of the University are teaching from their various points of view, it follows that no reasonable person could conclude that any of them is speaking for the University.[2] Whether academic freedom is protected by the First Amendment (as we contend) or is merely protected by University regulation (as respondents concede), the result is the same: the professor's speech is *free* and is not subject to the limits on *government power* that are imposed under the Establishment Clause. See Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers,* 81 Nw. U.L. Rev. 1 (1986).

3. Even if respondents are correct that Professor Bishop's words are the words of the State for purposes of Establishment Clause analysis, it would not follow that his optional lecture or the "occasional comments" he makes in class would violate the Establishment Clause. Under the facts of the case as determined by the district court and accepted by the court of appeals, Bishop's comments did not "rise to th[e] level" of "coercion" or even of "proselytiz[ing]." Pet. App. A27, A32. The court doubted "that [Bishop's] minimal comments exert influence on the religious beliefs of college or graduate students" (*id.* at A36). If this Court were to conclude that respondents' arguments about the Establishment Clause have a bearing on the certworthiness of this case, it should, at a minimum, hold

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University's censorship of Professor Bishop's speech is upheld. If his academic freedom is upheld, there will be no need for "monitoring."

[2]This explains why the principles are different for universities than for elementary and high schools. Students in elementary and high school are vulnerable to indoctrination and would not perceive the comments of the teacher as being merely his own opinion. This is partly because of the age of the students and partly because the traditional function of the elementary and high schools is to inculcate community values.

the petition for consideration in light of *Lee v. Weisman*, No. 90-1014.

4. Respondents further claim that even if petitioner has First Amendment rights, they must be "balanced" against the rights of the students to be shielded from hearing his views. Br. in Opp. 14-15. This line of reasoning has long been rejected by this Court. See *Martin v. City of Struthers*, 319 U.S. 141 (1943). To allow the government "to shut off discourse solely to protect others from hearing it" would "effectively empower a majority to silence dissidents simply as a matter of personal predilections." *Cohen v. California*, 403 U.S. 15, 21 (1971). Under a regime of academic freedom, the students have a First Amendment right to hear viewpoints the government may deem "inappropriate." This right is complementary to the professor's right to speak. Far from "protecting " the students' First Amendment rights (Br. in Opp. 26), the University violates them when it attempts to filter out unconventional points of view.

In this respect, religious viewpoints are not different from any other viewpoints students might find irritating or provocative. Indeed, respondents take the position that students should be protected from all of the "personal views" of the faculty "whether political, social, or religious" (Br. in Opp. 5).

5. Respondents argue that academic freedom belongs to the institution and not to the individual instructor, who has few if any rights in the classroom. Br. in Opp. 16-22. In support of this proposition, they cite law review articles by two distinguished academicians. *Id.* at 16-19, 21. We are not unaware of the scholarly debate. Indeed, we cited yet another scholar taking a similar position (Pet. 20), along with two scholars supporting our position (Pet. 16, 20). That the issue is a subject of intense debate in the scholarly literature only underscores its importance.

Respondents can hardly claim that their position is widely accepted; indeed, they have to explain away many statements in this Court's opinions as "rhetoric" (Br. in Opp. 19, 21) and

were not able to find a state or lower court opinion supporting their position in the university context. The decision below is in clear conflict with the weight of authority on this point.[3]

6. Respondents attempt to portray petitioner's position as "establish[ing] an absolute right for faculty members to speak [in the classroom] about whatever they wish" (Br. in Opp. 9). In the Petition, however, we take pains to explain that in petitioner's view, the University has the right to set the curriculum, evaluate the professional competency of the faculty, and ensure that extraneous remarks do not consume so much time that coverage of the material suffers, that the professor's comments be nondisruptive, and that the comments be noncoercive. Pet. 28-29. Our position is simply that University administrators must exercise these powers in a viewpoint-neutral way, not singling out particular viewpoints or ideologies for special regulation, and that within the limits so established, professors have the right to express their personal and professional opinions in the classroom even if administrators think those opinions are "inappropriate."

7. The Brief in Opposition makes numerous claims about the University's interests in controlling faculty speech, which if they are references to the facts of this case are clearly contradicted by the record.

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[3]Respondents make the carefully-worded claim that "[n]one of the cases cited by petitioner squarely hold that a professor, in the context of a university class, has the right to interject comments about personal beliefs unrelated to the subject matter over the well-founded objection of administrators" (Br. in Opp. 19). As respondents concede, however, Professor Bishop's opinions "may be derived or inferred from the conclusions Bishop draws from his study of the assigned subject matter" (*id.* at 9 n.6). Respondents do not deny that cases recognizing academic freedom at the high school level apply *a fortiori* at the university level. And by definition, none of the cases treat unconstitutional interference with academic freedom as "well-founded." Other than this thrice-meaningless comment, respondents do not deny that the decision below is in conflict with numerous lower court decisions, cited in the Petition at 18-19.

(a) Respondents claim (Br. in Opp. 18) an interest in ensuring that the students' right to "receiv[e] instruction for which they had paid" is not thwarted by a professor who "spend[s] class time discussing at his whim such things as his religious beliefs." Petitioner does not deny this interest, but contends that it must be enforced evenhandedly, without discrimination as to viewpoint. In this case, it is undisputed that all petitioner's comments, put together, never exceeded five minutes over the course of a semester, and that other professors at the University spend this much time or more on matters not directly related to the curriculum. Petitioner himself retains the freedom to spend class time talking about movies, sports, politics, or other subjects. The directive does not refer to the *quantity* of petitioner's comments, but to their "Christian perspective." Pet. App. A35. This suggests that this purported justification for the University's order is a sham.

(b) Respondents assert that Professor Bishop's classroom comments were "wholly unrelated to his assigned subject," suggesting that this removes them from the protections of academic freedom. Br. in Opp. 9. Two pages later they note that the optional lecture was "directly connected to the classes assigned to Bishop" (*id.* at 11) — this time making the opposite argument that the connection to his classes renders the speech vulnerable to regulation.

We do not know what difference any of this makes, since other professors are free to make comments unrelated to their subject matter, and some of the most important First Amendment cases in the academic freedom area involve nongermane speech. See *Tinker v. Des Moines Independent School Dist.*, 399 U.S. 503 (1969). But for the record, most of petitioner's comments did relate to his assigned subject. Certainly his comments about coping with academic stress were relevant to his work with graduate students on thesis research.[4] His com-

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[4]Professor Bishop teaches a course for graduate students entitled "Dissertation and Thesis Research." Deposition of Phillip A. Bishop (March 14, 1989) at 45.

ments about intelligent design "may be derived or inferred from conclusions Bishop draws from his study of the assigned subject," as respondents concede (Br. in Opp. 9 n.6). And the optional after-class meeting was based on "technical material" covered in graduate physiology courses (Bishop Dep. at 39). The court of appeals clearly stated that the University's order applied "even to the extent it represents [petitioner's] professional opinion about his subject matter" (Pet. App. A20). Respondents' attempt to rewrite the question presented as involving solely "personal" beliefs (Br. in Opp. i) — whatever that means — is a mischaracterization of the holding below.

(c) Respondents warn that an individual faculty member must not be allowed to "override[] collective judgments about curricular content" (Br. in Opp. 25). But it is undisputed that petitioner taught the assigned curriculum. The case is not about choice of curriculum, but about the professor's right to express personal and professional opinions within the assigned curriculum.

(d) Respondents continue to claim that petitioner's speech was "coercive" (Br. in Opp. 9, 27). But the district court expressly rejected this allegation (Pet. App. A37, A36).[5]

(e) Finally, the University seeks to portray Professor Bishop's comments as dogmatic utterances "conveyed as unquestionable truth" (Br. in Opp. 10). Nothing could be further from the truth. Even the court of appeals acknowledged that "Dr. Bishop's efforts to identify a personal bias, present it to his students, and hold it up for criticism are admirable" (Pet. App. A18 n.7). As a constitutional principle, we would

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[5]This finding was not contradicted by the court of appeals. To be sure, that court stated that it was taking into consideration "the coercive effect upon students that a professor's speech *inherently* possesses" (Pet. App. A16, emphasis added). This was not a finding that Professor Bishop's speech, in particular, was coercive, but that all classroom speech is coercive. We strongly take issue with this conclusion (Pet. 23), but it does not help respondents here. If *all* classroom speech by faculty is coercive, this can provide no reason to single out Professor Bishop.

note that even dogmatic professors are entitled to freedom of speech. But as a factual matter this charge is unfounded and unfair.[6]

8. Respondents defend the so-called "balancing approach" of the court of appeals (Br. in Opp. 22-25). But they make no reference to the most objectionable feature of the court's approach: its reduction of the level of protection for academic speech to the lowest level of scrutiny (Pet. App. A15, A16, A19, A20, A24), even when the University officials have engaged in viewpoint discrimination (Pet. App. A10, A20).[7] Moreover, the key element in the court's balance was the University's supposed "interest . . . in scrutinizing expressions that 'the public might reasonably perceive to bear [its] imprimatur'." Pet. App. A13 (brackets in original). A "balance" conducted under these terms is constitutionally defective, for the reasons set forth in the Petition (at 11-14). Conspicuously, respondents do not deny that under the reasoning of the court of appeals, a University would be able to suppress the expression of other views (Maxism, feminism, opposition to affirmative action, support for the Contras) that the public might also perceive as being objectionable, as pointed out in the Petition (at 13-14, 29). Surely such a decision cannot be allowed to stand without searching review by this Court.

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[6]It is also *post hoc*. The administrators did not even know the precise content of Professor Bishop's comments until after they had issued the order. Deposition of Carl Westerfield (Jan. 5, 1989) at 29.

[7]Respondents' claim that academic freedom rights are no greater than the rights of public employees is addressed at Pet. 22-23. But it is particularly absurd to argue that the professor's free speech right only applies to matters of "public concern." Br. in Opp. 22-24; cf. *Connick v. Myers*, 461 U.S. 137 (1983). If "public concern" is used in the narrow sense of pertaining to government or public life, most of what goes on in the university classroom falls outside that category. If "public concern" is interpreted more broadly, the exchange of ideas in the university setting is inherently a matter of public concern — *no matter what the subject matter happens to be*. It may be that some speech by faculty (gossip in the faculty lounge, griping about poor pay) is analogous to the speech in *Connick*, but speech in the classroom is not.

9. Finally, respondents fall back on a plea that this Court defer to "the institution's professional judgment" (Br. in Opp. 21). In some cases, that might be well taken. But respondents spent the first half of their brief telling us that their decision to censor Professor Bishop was compelled by the Establishment Clause. The administrators themselves had treated the question as a "legal issue" (Roth Dep. 20, 36), and had based their decision on advice of counsel, who told them they had a "duty" to "control this kind of activity." Westerfield Dep. Exh. 10. They cannot now escape judicial scrutiny by claiming that this is a pedagogical issue. Petitioner's superiors have engaged in naked viewpoint discrimination, and all possible neutral explanations have been examined and refuted by the lower courts. The court of appeals has rendered a far-reaching opinion eliminating constitutional protection for academic freedom in the classroom, applicable to political and social, as well as religious speech. This is no time for deference. It is time for reaffirmation of fundamental principles of constitutional law.

CONCLUSION

For the reasons stated in the Petition and those stated above, the Petition should be granted.

Respectfully submitted,

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No. 91-286

In The

Supreme Court of the United States

October Term, 1991

PHILLIP A. BISHOP,

Petitioner,

v.

O. H. DELCHAMPS, JR., ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF DR. HENRY F. SCHAEFER III, DR. GERALD R. BERGMAN, DR. CLINTON H. GRAVES, AND DR. BYRON R. JOHNSON AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the First Amendment permits a public university to suppress speech by its faculty members presenting a religious viewpoint – while permitting comparable non-religious speech – based solely on the assumption that such religious speech "inherently" bears the university's endorsement and "inherently" pressures students to accept those religious beliefs.

2. Whether the establishment clause requires such suppression without any finding that the state has actually endorsed those religious beliefs or coerced students to accept them.

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Pursuant to Rule 37 of this Court, amici curiae Schaefer, Bergman, Graves, and Johnson move for leave to file a brief amici curiae.

1. Parties Consenting and Refusing Consent

Petitioner Phillip Bishop consented to the filing of the appended brief amici curiae and respondents Delchamps, *et al.* refused to consent. Petitioner's letter of consent has been lodged with the Court.

2. Nature of Applicants' Interest

Amici Schaeffer, *et al.* are four professors from across the United States who encountered various forms of opposition and discriminatory discipline at public universities when they engaged in on-campus religious expression similar or identical to that of petitioner. Therefore, they have a very real interest in disclosing to this Court the pervasive and recurring problem of censorship of the classroom expression of public university faculty.

3. Questions Uniquely Addressed By Amici

The appended brief of amici curiae provides the Court with a broader perspective on the national scope of the problem presented in this case. Censorship of faculty expression receives inconsistent treatment among public universities and, thus, the issue requires clarification from this Court.

In addition, while deferring to petitioner's brief on the issue of academic freedom, amici provide this Court with analysis of a) whether the establishment clause of the First Amendment provides a basis for selective suppression of occasional, non-coercive religious comments by a professor in class or in an optional lecture and b) whether the free speech clause of the First Amendment requires the showing of an actual violation of the establishment clause before speech like Dr. Bishop's may be suppressed.

Accordingly, amici's motion should be granted and their appended brief considered by the Court in its deliberation on the petition for certiorari.

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TABLE OF CONTENTS

Page

INTRODUCTION 1

INTEREST OF AMICI CURIAE 2

REASONS FOR GRANTING THE PETITION 4

I. The Occasional In-Class Expressions of a Public University Professor Cannot Be Construed As Bearing the University's Imprimatur, And Thus Are Protected Under the First Amendment When They Are Nondisruptive and Noncoercive 9

II. The University's Suppression of Petitioner's Religious Speech Discriminates On the Basis of His Viewpoint Without Justification 12

III. The University's Concern With Establishment Clause Violations Provides No Basis For Discriminatorily Suppressing the Occasional, Noncoercive In-Class Religious Comments of A Professor 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES:

Aguilar v. Felton, 473 U.S. 402 (1985) 19

Airport Commissioners v. Jews for Jesus, Inc., 482 U.S. 569 (1987) 14

Bergman v. Bowling Green State University, No. 86-3031 (6th Cir. June 16, 1987) 3

Board of Education v. Barnette, 319 U.S. 624 (1943) 13

Board of Education v. Mergens, 110 S. Ct. 2356 (1990) .10, 17

Bowen v. Kendrick, 487 U.S. 589 (1988) 19

Cantwell v. Connecticut, 310 U.S. 296 (1940) 13

Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788 (1985) 13, 14

Employment Division v. Smith, 110 S. Ct. 1595 (1990) 13

Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985) 19

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) 10

Healy v. James, 408 U.S. 169 (1972) 8, 9, 12, 19, 20

Johnson v. Carpenter et al., No. 91-2075 (W.D. Tenn. Jan. 25, 1991) 4

Keyishian v. Board of Regents, 385 U.S. 589 (1966) 9

McDaniel v. Paty, 435 U.S. 618 (1978).....8, 13

Murdock v. Pennsylvania, 319 U.S. 105 (1943)..... 13

Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 13

TABLE OF AUTHORITIES – Continued

Page

Rust v. Sullivan, 111 S. Ct. 1759 (1991) 9, 18

Terminiello v. City of Chicago, 337 U.S. 1 (1949)..... 15

Texas v. Johnson, 491 U.S. 397 (1989)..... 15

Tilton v. Richardson, 403 U.S. 672 (1971) 10

Tinker v. Des Moines School District, 393 U.S. 503 (1969) 8, 14, 15, 18, 20

Widmar v. Vincent, 454 U.S. 263 (1981)..... *passim*

MISCELLANEOUS:

Freeman & Mensch, *The Politics of Virtue: Animals, Theology, and Abortion*, 24 Ga. L. Rev. 923 (1991) 6

Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1 (1986) 14

Lowell, *A. Lawrence Lowell on Academic Freedom in Wartime*, in 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 879 (R. Hofstader and W. Smith, eds. 1961) 11

McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 L. & Contemp. Probs. 303 (1990) 6

M. Perry, MORALITY, POLITICS & LAW (1988) 7

Smolin, *The Judaeo-Christian Tradition and Self-Censorship in Legal Discourse*, 13 U. Dayton L. Rev. 345 (1988) 6

Wall St. J., Sept. 5, 1991 12

Undergraduate Catalog 1988-90: University of Alabama (1988)..... 10

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BRIEF OF DR. HENRY F. SCHAEFER III, DR. GERALD R. BERGMAN, DR. CLINTON H. GRAVES, AND DR. BYRON R. JOHNSON AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR CERTIORARI

INTRODUCTION

Amici are public university professors who – like petitioner Dr. Phillip Bishop – have experienced harassment or discrimination because they have expressed religious perspectives in the course of teaching their academic subjects. *Amici* wish to apprise the Court that the issues raised in this case are recurring at public universities throughout the country and in a variety of subject areas. *Amici*'s particular experiences are set forth

in detail in the Interest of Amici Curiae immediately following.[1]

INTEREST OF AMICI CURIAE

Dr. Henry F. Schaefer, III, is a chaired professor of chemistry at the University of Georgia and a multiple Nobel Prize nominee. During his first year at Georgia, 1987-88, Dr. Schaefer accepted the invitation of a student religious group to present five or six one-hour lectures on campus concerning science and Christianity. The lectures were strictly optional and unrelated to any course (Dr. Schaefer had no teaching assignments at the time). A dozen or more faculty members complained to administrators about a university employee discussing a religious topic on campus. However, on advice of counsel, university officials took no action against Dr. Schaefer. Instead, they simply requested that any advertisements state that his lectures were not university-sponsored and were not required for any course. Dr. Schaefer complied.

In addition, during the first class meeting of each of his courses, Dr. Schaefer makes a fifteen-second statement disclosing his religious faith and the fact that it frames his analysis of and approach to science. The university has not sought to restrict these statements.

Dr. Gerald R. Bergman, currently a tenured professor at Northwest Technical College in Ohio, was denied tenure in 1979 as a statistics professor at Bowling Green State

[1] Copies of documents detailing the particulars of *amici*'s own experiences are being lodged with the Clerk of the Court.

University. Dr. Bergman has doctorates in statistical research and biology and has published numerous books and articles. Much of his published work involves criticism of Darwinian evolutionary theory. University officials admitted, in pretrial discovery in Dr. Bergman's lawsuit, that their decision to refuse tenure was based in part on the speculation that, given Dr. Bergman's vocal religious beliefs, he must have made improper religious comments in the classroom. (Dr. Bergman denies having made any such in-class remarks.) The U.S. Court of Appeals for the Sixth Circuit, in an unpublished opinion in 1986, upheld the university's action, accepting the legitimacy of the university's other purported reasons for denying tenure. *Bergman v. Bowling Green State University*, No. 86-3031 (6th Cir. June 16, 1987) (per curiam).

Dr. Clinton H. Graves has for almost 40 years been a professor of plant pathology at Mississippi State University. Spurred by a recommendation at a faculty training seminar, Dr. Graves began a practice of introducing himself to his students at the beginning of a semester by asking them to list their personal and educational interests on a note card and then, in turn, himself distributing a one-page biographical sketch summarizing his own education, scholarship, and personal interests. At the bottom of this resume, among his personal interests, Dr. Graves typically stated simply that he was "committed: to the lordship of Jesus Christ." In addition, he made occasional brief, non-proselytizing comments to students in class concerning his religious beliefs and their relation to issues in plant biology.

In 1985, Dr. Graves received a letter from the American Civil Liberties Union of Mississippi demanding that he take steps to "remedy" the "possibility that you are introducing significant religious content into your regular

classroom proceedings." Copies of this letter were sent to the university's president and trustees. Dr. Graves responded in writing that he "did not believe that professors should teach religion in classes not designed for that purpose," but that he was "not required to cease being what I am, a Christian, the moment I walk on campus." The ACLU never pursued the matter, nor did it seek to remedy any intimidation or other damage its letter might have caused Dr. Graves.

Dr. Byron R. Johnson was an assistant professor of criminology at Memphis State University from 1986 through 1991, when his contract was terminated. Beginning in 1987, Dr. Johnson was instrumental in organizing a Christian Faculty/Staff Fellowship at Memphis State. He did not, however, discuss his religious beliefs in class. Although Dr. Johnson published more and received higher teaching evaluations than any other assistant professor in his department, he received substantially smaller salary increases from 1988 through 1990 than other department members, and was eventually terminated. During discussions with Dr. Johnson, university officials told him he "did not fit in" and that "given his philosophical leanings, he should consider teaching at some smaller religious affiliated school." Complaint in *Johnson v. Carpenter et al.*, No. 91-2075, at 4-8 (W.D. Tenn. Jan. 25, 1991). Dr. Johnson has sued the university in federal district court under federal civil rights laws (see *ibid.*), and that lawsuit is now in pretrial discovery.

REASONS FOR GRANTING THE PETITION

Amici strongly endorse the conception of academic freedom set forth in the petition for certiorari. As public

university professors, *amici* too are deeply troubled about the court of appeals' opinion, which reduces the protection of academic freedom in the classroom to the lowest level of judicial scrutiny, rational-basis review. Pet. App. A15. Like petitioner, we strongly believe that American higher education cannot function in anything like its current form under the supposition that in-class speech by professors must be controlled because it inherently "creates the appearance of [university] endorsement" and has a "coercive effect" on students. See Pet. App. A22, A16.

This case involves restrictions on a professor's occasional in-class comments and an optional out-of-class lecture, both presenting his personal views on the subject of his academic expertise. *Amici*'s own experiences, detailed *supra* in the Interest of Amici Curiae, reveal that the problem presented here is recurring on campuses throughout the nation. Although this case and *amici*'s experiences involve religious speech in particular, we are shocked at the breadth of speech rendered vulnerable by the court of appeals' decision.[2] Indeed, the decision sets forth a rationale for approving a university's broad power to censor any comments that might "produce more apprehension than comfort in students." Pet. App. A10. This view is completely antithetical to the premise underlying higher education – that students grow intellectually

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[2] For example, the court expressly analogized the religious speech here to statements by a "sexist instructor" (Pet. App. A10), necessarily implying that a university has virtually unlimited power to prohibit comments that someone might complain of as "sexist."

from confronting new or disturbing ideas, not from avoiding them.

We do wish to draw the Court's attention to the fact that religious speech is particularly susceptible to being singled out for suppression. Petitioner was reprimanded for his expression solely because of the religious viewpoint presented in it; the University routinely permits faculty to present non-religious perspectives in the classroom in their areas of expertise. *Amici*'s experiences show that such discrimination is, unfortunately, typical. Religiously committed academics in public universities across the country face resistance when they attempt, however briefly, to discuss or even disclose their ideological perspective in the course of their teaching or scholarship.

As the experiences of both petitioner and *amicus* Dr. Henry Schaefer show, the mere effort to initiate discussion of the relations between religious beliefs and "secular" academic subjects draws fire from those who deem such talk "inappropriate" for a public university. See *supra* p. 2; Pet. App. A27. Several commentators have also described this culture of resistance to religious thought in institutions of higher education.[3]

Sometimes university administrators respond to complaints as they did here: by restricting the expression or denying advancement to the speaker. In other instances,

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[3] See, *e.g.*, Freeman & Mensch, *The Politics of Virtue: Animals, Theology, and Abortion*, 24 Ga. L. Rev. 923 (1991); McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 L. & Contemp. Probs. 303, 315 (1990); Smolin, *The Judaeo-Christian Tradition and Self-Censorship in Legal Discourse*, 13 U. Dayton L. Rev. 345 (1988).

such as Dr. Schaefer's, university officials have defended faculty members' rights of free speech. But we question whether the administrators and lawyers at the University of Georgia (which, like the University of Alabama, is located in the Eleventh Circuit) would have supported Dr. Schaefer had the court of appeals' holding in this case been on the books at the time.

Amici's experiences undermine the claims of those who would deny academics the right to make mention of their religious perspective in the classroom. Teachers such as petitioner and *amici* do not use their positions to proselytize students. They disclose their religious commitments, briefly and without applying pressure, so as to help students in understanding and evaluating the teacher's classroom presentations. See *supra* pp. 2, 3; Pet. App. A28. Petitioner and *amici* also believe that their religious perspective informs and shapes their scholarship and analysis, and that by entirely suppressing this perspective they would be giving their students an intellectually dishonest presentation. See *supra* pp. 2, 3; Pet. 22.

There are many reasons why discrimination against religious expression occurs. Religious expression can easily raise controversy, which some university administrators wish to avoid at all costs. Some educators hold a stereotype of religious views as intolerant, unenlightened, and altogether unsuitable for a place of intellectual inquiry. See, *e.g.*, M. Perry, MORALITY, POLITICS & LAW 183 (1988) (decrying secular thinkers whose "reductionist attitudes to religious thought" prevent them from "explor[ing] some of the richest resources for thinking about the human"). Thus, for example, petitioner's supervisor denigrated his views as "Bible belt" and therefore

"inappropriate" at the University (Westerfield Dep. at 44); and *amicus* Dr. Byron Johnson was told he "did not fit in" at Memphis State and, "given his philosophical leanings," should instead teach at a "religious" college (*supra* p. 4). Above all, as this case shows, officials proceed on the mistaken assumption that religious discussion must be "kept out of the classroom" entirely, on account of the establishment clause.

These rationales must be soundly rejected. The Constitution does not permit "government to treat religion and those who practice or teach it . . . as subversive of American ideals and therefore subject to unique disabilities." *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment). What the establishment clause forbids is endorsement of religion by the government – not by individuals who, like petitioner, happen to be government employees. Of course, if a professor pursues his in-class religious speech to such an extent that course coverage suffers, or the classroom is suffused with an evangelistic or liturgical atmosphere, or students are pressured to conform to his beliefs, then the school may and should act. But such restrictions must rest on a substantial showing, based on specific facts, that the *university's* name is being tied to religious indoctrination or that a professor is diverting classroom time to that purpose. See *Widmar v. Vincent*, 454 U.S. 263, 275-276 (1981); *Healy v. James*, 408 U.S. 169, 190-191 (1972); *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 508-509 (1969).

There was no such showing in this case. The record is undisputed: petitioner's comments were nondisruptive, noncoercive, and clearly identified as his own "personal

bias." The University's actions rested only on its unsupported legal conclusion that any and all religious comments in the classroom violate the establishment clause, and on the bare complaint by a few students that such comments are "inappropriate." The First Amendment does not permit the singling out of religious speech based on such thin foundations. Religious speech is not a luxury to be left to the mercy of transient standards of "political correctness." It is an individual's inalienable right, protected by the First Amendment and unyielding except upon clear proof that the *state* is endorsing or coercing religious belief through the speech.

I. The Occasional In-Class Expressions of a Public University Professor Cannot Be Construed As Bearing the University's Imprimatur, And Thus Are Protected Under the First Amendment When They Are Nondisruptive and Noncoercive.

The decision of the court of appeals in this case constructs a framework authorizing virtually limitless censorship of in-class or classroom-related speech by professors. This Court has recently reaffirmed that the university is a "traditional sphere of free expression" (*Rust v. Sullivan*, 111 S. Ct. 1759, 1776 (1991)); indeed, the Court has long recognized that the college "classroom is peculiarly the 'marketplace' of ideas" (*Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1966)).[4] Yet, as noted in the petition for certiorari, the decision below reduces the academic freedom of university professors to the level of

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[4] Accord *Widmar v. Vincent*, 454 U.S. 263, 267 n.5 (1981) (quoting *Healy v. James*, 408 U.S. 169, 180 (1972)).

students receiving journalism training in a high school class. Pet. 17 (citing *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)).

The court's startling conclusion rests on two propositions that are entirely inconsistent with the premises and traditions of American higher education: first, that "a teacher's speech can be taken as directly and deliberately representative of the school" (Pet. App. A13); and second, that "a professor's speech inherently possesses" a "coercive effect upon students" (*id.* at A16). We agree with the arguments set forth in the petition for certiorari that these assumptions are incompatible with any significant guarantee of academic freedom. See Pet. 11-14, 21-24. We add only the following observations.

The proposition that a university endorses everything it does not censor evaporates under even the most minimal scrutiny. The University of Alabama itself offers religion and philosophy courses in subjects as varied as Myth, Ritual and Magic; Native American Religions; and Existentialism and Phenomenology. *Undergraduate Catalog 1988-90: University of Alabama* 327-333 (1988). Obviously neither students nor anyone else believe that the University vouches for everything that teachers say in each of these classes. Numerous decisions of this Court wisely recognize that college and university students are sufficiently mature to disassociate the speech of individuals from the position of the university, and are not readily susceptible to ideological indoctrination. *Widmar, supra*, 454 U.S. at 274 n.14; *Tilton v. Richardson*, 403 U.S. 672, 686 (1971); cf. *Board of Education v. Mergens*, 110 S. Ct. 2356, 2372 (1990) (same factors true even of high school students).

Moreover, the court of appeals' reasoning and result ultimately would place universities themselves under untenable pressure. As President Lowell of Harvard stated in a famous speech during World War I, resisting pressure from alumni to dismiss a pro-German professor:

> If a university or college censors what its professors may say, if it restrains them from uttering something that it does not approve, it thereby assumes responsibility for that which it permits them to say. This is logical and inevitable, but it is a responsibility which an institution of learning would be very unwise in assuming.

Lowell, *A. Lawrence Lowell on Academic Freedom in Wartime*, in 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 879 (R. Hofstader & W. Smith eds. 1961). If universities that decline to censor faculty speech are thereby held to have endorsed it, one can expect constant, severe, and distracting public pressure on school administrators to engage in such censorship in a host of individual cases.

The court of appeals attempted to limit its holding to petitioner's "classroom speech." Pet. App. A18. But its rationale authorizes limitations on many other forms of faculty expression. If a professor's in-class speech can be attributed to the university merely because he is employed there, so can his comments in the media or statements in his scholarly work. Surely, some students taking a professor's classes might feel discomfort or anger at his extracurricular speech or scholarship. Indeed, a federal court recently struck down restrictions placed on a controversial City College of New York professor whose extracurricular statements assertedly had "the potential to harm the process of education in his

classes." See, *e.g.*, Wall St. J., Sept. 5, 1991, at B8, col. 5 (quoting faculty committee's reasons for restrictions).[5]

II. The University's Suppression of Petitioner's Religious Speech Discriminates On the Basis of His Viewpoint Without Justification.

It is undisputed that the University imposed restrictions on petitioner's speech that it does not apply to other speech by its professors. The memorandum sent to petitioner speaks for itself; it is limited only to "the [in-class] interjection of *religious* beliefs and/or preferences" and the presentation in "optional classes" of "a *'Christian* perspective' of an academic topic." Pet. App. A27 (emphases added). On its face, the memorandum singles out religious speech alone for restriction.

Based on "[n]umerous undisputed affidavits," the district court found (and the court of appeals did not question) that "University policy does not prohibit faculty members from engaging in non-religious classroom speech involving personal views on other subjects." Pet. App. A28 (quoted at Pet. App. A6). "Nor is there a University policy prohibiting faculty members from organizing after-class meetings if discussions are not from a religious perspective" (*ibid.*), and other professors commonly participate in such meetings. Pet. App. A33. In short, contrary to the University's actions here, "[t]here is

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[5] The court of appeals' differing treatment of classroom speech conflicts with this Court's repeated statement that it is "[t]he college *classroom* with its surrounding environs" that "is peculiarly 'the marketplace of ideas.' " *Widmar*, 454 U.S. at 267 n.5 (emphasis added) (quoting *Healy*, 408 U.S. at 180).

no University policy attempting to control the statements of faculty members as long as they do their job." Pet. App. A6 (quoting *id.* at A28).

By restricting petitioner's speech solely because of its religious content, the University's actions transgress the most fundamental principles of the First Amendment. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

Speech presenting a religious perspective is entitled to the same nondiscriminatory treatment as other forms of speech. *Widmar, supra*, 454 U.S. at 269; *Board of Educ. v. Barnette*, 319 U.S. 624 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Likewise, the central focus of the free exercise clause, under this Court's precedents, is to prevent the state from singling out religious speech and activity for suppression or disabilities. *Employment Division v. Smith*, 110 S. Ct. 1595, 1599 (1990) (state may not ban "acts or abstentions only when they are engaged in for religious reasons, or only because of the religious beliefs they display"); *McDaniel v. Paty*, 435 U.S. 618 (1978).

The court of appeals' conclusion that "a university classroom is [not] an open forum during instructional time" (Pet. App. A8-A9) does not undercut the application of this principle. First, the court of appeals' conclusion was in error. "[A] university campus, at least as to its students, possesses many of the characteristics of a traditional public forum." *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473 U.S. 788, 803 (1985) (citing *Widmar*, 454 U.S. at 267 n.5). Given that the college classroom is "peculiarly" the "marketplace of ideas" (see *supra* pp. 9-10), the

forum must extend to the in-class expression of professors as well. In any event, the University here has created a forum for faculty speech. Just as the university's policy in *Widmar* of allowing access to its facilities "created a forum generally open for use by student groups" (454 U.S. at 267), so the University's clear practice here of allowing professors to engage in occasional personal comments during class and to deliver out-of-class lectures creates an open forum for such expression.

Second, whatever the nature of the forum, "the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." *Cornelius*, 473 U.S. at 806. Petitioner's speech plainly concerned an "includible subject" – human physiology, the very subject he taught – and the University acted to suppress only a religious viewpoint – the "Christian Perspective" (Pet. App. A27) – on this academic subject.[6]

The court of appeals' reasons for permitting discriminatory suppression of petitioner's religious speech plainly do not amount to the "compelling interest" required by this Court's cases (see *Widmar*, 454 U.S. at 270). Neither the University nor the court of appeals

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[6] In addition, public forum analysis does not apply here. There is no question of petitioner's right of access to the classroom; because he was going about his business of teaching in a place he was entitled to be, he is presumptively entitled to speak under *Tinker*. See *Tinker*, 393 U.S. at 512-513; *Airport Commissioners v. Jews for Jesus, Inc.*, 482 U.S. 569, 573 (1987) (citing Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U. L. Rev. 1, 48 (1986)).

identified any colorable pedagogical reason for suppressing petitioner's brief in-class comments or his optional lecture. It is undisputed that petitioner covered the course material fully and that he was a well-regarded and successful teacher. Pet. App. A32.

Instead, the court held that the University had a legitimate interest in preventing "religious bias" from "infecting the teacher or the students," because expression of a religious viewpoint "no matter how carefully presented . . . engenders anxiety in students." Pet. App. A19, A22. But discomfort, anger, or anxiety on the part of a student or two cannot authorize suppression of a viewpoint. For "school officials to justify prohibition of a particular expression of opinion, [the school] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. The First Amendment will not countenance a "heckler's veto":

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling affects as it presses for acceptance of an idea. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas.

Terminiello v. City of Chicago, 337 U.S. 1, 4 (1949); accord *Texas v. Johnson*, 491 U.S. 397, 408-409 (1989). To hold, as the court of appeals did, that a viewpoint may be singled out because it alone "has produced student complaints"

(Pet. App. A10) strikes at the heart of the First Amendment.

III. The University's Concern With Establishment Clause Violations Provides No Basis For Discriminatorily Suppressing the Occasional, Non-Coercive In-Class Religious Comments of a Professor.

As we have just shown, the University had no colorable pedagogical reason for suppressing petitioner's speech. Rather, administrators believed they were under a "legal duty" (P1. Exh. 10, at 3; Roth Dep. at 20, 36) "to avoid an establishment of religion by Dr. Bishop's conduct which connected the University to a particular religious viewpoint." Pet. App. A21. The district court too found that "[t]he University's only justification for exclusion is an effort to avoid an establishment of religion." Pet. App. A32.

The court of appeals did not ultimately decide the establishment clause question. It held that the University could suppress petitioner's speech merely to avoid a "potential establishment conflict." Pet. App. A21. But the court made clear that its analysis was predicated on a finding that in-class religious speech by a professor is *per se* coercive:

> [T]he expression of a religious position in a secular subject, no matter how carefully presented, creates the appearance of endorsement of that position by the University and engenders anxiety in students who may feel compelled to feign a similar belief and, worse still, deny their own beliefs.

Pet. App. A22.

These bald assertions provide no basis for content-based suppression of petitioner's speech. In the first

place, there can be no question but that petitioner's actions did not amount to an actual establishment clause violation – as the district court found. As we have already shown, a reasonable observer would not perceive any government endorsement of, or "imprimatur of state approval on," petitioner's religious views merely because the University permitted him to express such views. *Widmar*, 454 U.S. at 274.[7] To permit petitioner to express his religious perspective on his area of expertise would be merely an "incidental," not the "primary," effect of the University's general policy of permitting professors to engage in nondisruptive personal expression during classroom periods. See *Mergens*, 110 S. Ct. at 2373; *Widmar*, 454 U.S. at 274-275.[8]

Nor is there a shred of record evidence that petitioner used the power of the state to coerce any student into religious activity or profession. The district court specifically found no coercion (Pet. App. A27, A36), and any

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[7] See *Mergens*, *supra*, 110 S. Ct. at 2372 (even at high school level, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated").

[8] Plainly, petitioner's individual endorsement of religion cannot itself be impermissible under the establishment clause. The establishment clause prohibits only governmental endorsement of religion; and religious speech by individuals not only is not illegal, but is a constitutionally protected and inalienable right. A professor's endorsement of religion cannot implicate the establishment clause unless the particular circumstances give rise to an inference of state endorsement – and in a sphere of free expression, such an inference is almost always unwarranted. If public employees are to have any rights of religious speech, the distinction between individual and governmental endorsement of religion must be preserved. The court of appeals' knee-jerk finding of state endorsement undermines the distinction, and this Court should correct that fundamental misstep.

other conclusion would be insupportable. Petitioner explicitly stated to his students that his religious views were his own "bias," which they need not share. Pet. App. A3. Attendance at the "optional class," moreover, was truly optional and had no effect on grades because petitioner used a blind grading system. Pet. App. A27. No student testified that he or she had felt coerced by petitioner's statements.

The absence of any showing of an establishment violation is dispositive. In a "traditional sphere of free expression" such as the university (*Rust, supra*, 111 S. Ct. at 1776), the suppression of a professor's religious speech must be based on a clear finding, supported by record evidence, of an actual establishment violation. Speculation, such as the court of appeals', about "potential" establishment concerns and "inherent" effects (Pet. App. A21, A16) is not enough.

The court of appeals' proposition – that "[t]he University can restrict speech that falls short of an establishment violation" (Pet. A22) – is irreconcilable with *Widmar v. Vincent, supra*. The officials there defended exclusion of a religious group from school facilities open to other groups, based on the asserted interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause." *Id.* at 276. The Court rejected the argument, holding that this interest could not overcome the plaintiffs' rights under the free exercise and free speech clauses. *Id.* at 275-276.

Likewise, while schools may restrict student or teacher speech that "substantially interfere[s] with the work of the school" or "impinge[s] upon the rights of other[s]" (*Tinker, supra*, 393 U.S. at 509), the Court has always required a "specific showing" in the record that

such effects have occurred or likely will occur (*id.* at 511). See *id.* at 508 ("undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"); *Healy*, 408 U.S. at 190-191 (requiring "substantial evidence" of disturbance).

The court of appeals' analysis completely subordinates a professor's free speech and free exercise rights to the most speculative and groundless establishment clause concerns. This "unyielding weighting in favor of [disestablishment] over all other interests" (*Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985)), contravenes the First Amendment.

To be sure, a university has an interest in maintaining its neutrality concerning the views presented in the classroom and in ensuring that a professor does not use his university position to coerce students into adopting his views. When the views in question are religious and the university is public, that policy takes on constitutional significance because of the establishment clause. But merely because the policy is of constitutional status does not mean that mere speculation concerning it, or the slightest risk of violating it, should suffice to overcome free speech and free exercise rights. Several members of this Court have expressed dissatisfaction with the practice of finding establishment clause violations based on conjecture and presumptions rather than on record evidence. See, *e.g.*, *Aguilar v. Felton*, 473 U.S. 402, 427-429 (1985) (O'Connor, J., dissenting, joined by Rehnquist, J.); *Bowen v. Kendrick*, 487 U.S. 589, 624 (1988) (Kennedy, concurring, joined by Scalia, J.).

In sum, there is no "specific showing" in the record that petitioner's comments went beyond expression of his own personal outlook or violated the establishment

clause. Under *Tinker*, *Healy*, and *Widmar*, petitioner's free speech and free exercise rights must prevail over the University's unsupported conjectures about potential state endorsement or coercion.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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